(9)

No. 97-1985-CFY Title: Ellis E. Neder, Jr., Petitioner
v.
United States

Docketed: June 9, 1998 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Jun 9 1998	Petition for writ of certiorari filed. (Response due September 16, 1998)
	Jul 1 1998	DISTRIBUTED. September 28, 1998
	Jul 7 1998	Order extending time to file response to petition until August 10, 1998.
	Jul 31 1998	Order further extending time to file response to petition until September 9, 1998.
	Sep 14 1998	Brief of respondent United States in opposition filed.
	Sep 14 1998	Order further extending time to file response to petition until September 16, 1998.
	Sep 23 1998	REDISTRIBUTED. October 9, 1998
	Oct 13 1998	Petition GRANTED. limited to the following questions: 1. Whether the trial court's failure to instruct the jury on the materiality element in this case was harmless error because materiality was not in dispute at trial. 2. Whether materiality is an element of the crimes set forth in the federal mail fraud (18 U.S.C. Section 1341), wire fraud (18 U.S.C. Section 1343) and bank fraud (18 U.S.C. Section 1344) statutes. SET FOR ARGUMENT February 23, 1999.
		**********
	Nov 25 1998	Brief amicus curiae of National Association Criminal Defense Lawyers filed.
	Nov 25 1998	Joint appendix filed.
	Nov 25 1998	Brief of petitioner Ellis Needer filed.
	Nov 27 1998	Brief amici curiae of American Council of Life Insurance, et al. filed.
	Dec 22 1998	Order extending time to file brief of respondent on the merits until January 4, 1999.
	Jan 4 1999	Brief of respondent United States filed.
	Jan 14 1999	CIRCULATED.
	Jan 19 1999	Record filed.
	Feb 3 1999	Reply brief of petitioner Ellis Neder filed.
	Feb 23 1999	ARGUED.
	Feb 25 1999	Record filed.

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ELLIS E. NEDER, JR., PETITIONER,

v.

UNITED STATES, RESPONDENT.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was convicted of mail, wire, bank and tax fraud in violation of 18 U.S.C. §§ 1341, 1343, 1344, and 26 U.S.C. § 7206(1). The trial court, over defense counsel's timely objection, instructed the jury that it "need not consider" whether petitioner's allegedly fraudulent representations and omissions were material because materiality "is not a question for the jury to decide." Instead of submitting the materiality question to the jury, the trial court entered its own judicial finding that the alleged representations and omissions were material. On appeal, the Eleventh Circuit held that, as to the tax fraud counts, the district court's removal of materiality from the jury's consideration was constitutional error under *United States v. Gaudin*, 515 U.S. 506 (1995). However, the court concluded that the error was "harmless" because "materiality was not in dispute with respect to Neder's tax fraud offense." As to the mail, wire and bank fraud counts, the Eleventh Circuit held that the district court's removal of materiality from the jury's consideration was not erroneous under *Gaudin* since materiality is not an element of any of those statutory offenses.

The questions presented are:

1. Whether the complete removal of an essential element of a charged offense from the jury's consideration is subject to harmless-error review.

2. Whether materiality is an element of the crimes set forth in the federal mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343) and bank fraud (18 U.S.C. § 1344) statutes.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 9

I. THE COURT OF APPEALS' HOLDING THAT *GAUDIN* ERRORS ARE SUBJECT TO HARMLESS-ERROR REVIEW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND STATE COURTS OF LAST RESORT. 9

A. The Courts of Appeals Are Deadlocked As To Whether *Gaudin* Errors Are Subject To Harmless-Error Review 10

B. The Court of Appeals' Holding Squarely Conflicts With This Court's Harmless-Error Decisions 15

II. THE ELEVENTH CIRCUIT'S HOLDING THAT MATERIALITY IS NOT AN ELEMENT OF THE FEDERAL MAIL, WIRE AND BANK FRAUD STATUTES CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND OF THIS COURT. 20

A. The Courts of Appeals Are Deeply Split As To Whether Materiality Is An Element Of Federal Mail, Wire And Bank Fraud 20

B. The Court Of Appeals' Materiality Holding Is Contrary To This Court's Statutory And Common Law Decisions That Consistently Have Found Materiality To Be An Essential Element Of Fraud 26

CONCLUSION 30

TABLE OF AUTHORITIES

Cases **Page**

Abell v. *Potomac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1988) 21

Agency Holding Corp. v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987) 25

Basic, Inc. v. *Levinson*, 485 U.S. 224 (1988) 28

BMW v. *Gore*, 517 U.S. 559 (1996) 28

Bilzerian v. *United States*, 172 F.3d 237 (2d Cir. 1997) 6, 10

Bollenbach v. *United States*, 326 U.S. 607 (1946) 16

California v. *Roy*, 117 S. Ct. 337 (1996) 16, 18, 19

Carella v. *California*, 491 U.S. 263 (1989) . . . 16, 17, 18

Carpenter v. *Commonwealth*, 771 S.W.2d 822 (Ky. 1989) 12

Carpenter v. *United States*, 484 U.S. 19 (1987) 25, 27

Central Distribs. of Beer v. *Conn*, 5 F.3d 181 (6th Cir. 1993) 21

Chapman v. *California*, 386 U.S. 18 (1967) 2, 7, 19

TABLE OF AUTHORITIES — Cont'd

Page

Commonwealth v. *Tharp*, 541 A.2d 14 (Pa. Super. Ct. 1988) 13

Commonwealth v. *Thomas*, 514 N.E.2d 1309 (Mass. 1987) 12

Connecticut v. *Johnson*, 460 U.S. 73 (1983) 17

Crandon v. *United States*, 494 U.S. 152 (1990) 25

Dawson v. *State*, 894 P.2d 672 (Alaska Ct. App. 1995) 13

Durland v. *United States*, 161 U.S. 306 (1896) 27

Hammerschmidt v. *United States*, 265 U.S. 182 (1924) . 27

Hennessy v. *Goldsmith*, 929 F.2d 511 (9th Cir. 1991) 4, 13, 14

Hereford v. *State*, 615 So. 2d 1303 (Ala. Crim. App. 1993) 13

Holmes v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992) 26

Hoover v. *Garfield Heights Mun. Ct.*, 802 F.2d 168 (6th Cir. 1986), cert. denied, 480 U.S. 949 (1987) 12, 13, 14

TABLE OF AUTHORITIES — Cont'd

Page

Hunter v. *State*, 684 So. 2d 625 (Miss. 1996) 12

In re Winship, 397 U.S. 358 (1970) 16

Johnson v. *United States*, 117 S. Ct. 1544 (1997) . . *passim*

Jones v. *State*, 666 So. 2d 995 (Fla. Dist. Ct. App. 1996) 13

Lomas v. *State*, 639 P.2d 551 (Nev. 1982) 12

McBoyle v. *United States*, 283 U.S. 25 (1931) 24

McElroy v. *United States*, 455 U.S. 642 (1982) 24

McKinney v. *State*, 553 N.E.2d 860 (Ind. Ct. App. 1990) 13

McNally v. *United States*, 483 U.S. 350 (1987) 25, 27

Monk v. *State*, 619 A.2d 166 (Md. Ct. Spec. App. 1993) 13

Mouton v. *State*, 892 S.W.2d 234 (Tex. Ct. App. 1995) 11

Nationwide Mut. Ins. Co. v. *Darden*, 503 U.S. 318 (1992) 26

Old Chief v. United States, 117 S. Ct. 644 (1997) 20

TABLE OF AUTHORITIES — Cont'd

Page

People v. *Flynn*, 589 N.E.2d 383 (N.Y. 1992) 12

People v. *Kobrin*, 903 P.2d 1027 (Cal. 1995) 12

People v. *Mattas*, 645 P.2d 254 (Colo. 1982) 12

People v. *Navarette*, 629 N.E.2d 742 (Ill. App. Ct. 1994) 11

People v. *Vaughn*, 524 N.W.2d 217 (Mich. 1994) 11

Pope v. *Illinois*, 481 U.S. 497 (1987) 17, 18

Robinson v. *State*, 473 S.E.2d 519 (Ga. Ct. App. 1996) 13

Rogers v. *United States*, 118 S. Ct. 643 (1998) . 2, 3, 9, 15

Rogers v. *United States*, 94 F.3d 1519 (1996), cert. dismissed, 118 S. Ct. 643 (1998) 3, 13, 14

Rose v. *Clark*, 478 U.S. 570 (1986) 20

Santa Fe Indust., Inc. v. *Green*, 430 U.S. 462 (1976) . . 28

Schmuck v. *United States*, 489 U.S. 705 (1989) 25

Sedima, S.P.R.L. v. *Imrex Co., Inc.*, 473 U.S. 479 (1985) 25

TABLE OF AUTHORITIES — Cont'd

Page

Slusher v. *State*, 814 P.2d 504 (Okla. Crim. App. 1991) 12

Smith v. *Richards*, 38 U.S. 26 (1839) 28

Smoot v. *Commonwealth*, 445 S.E.2d 688 (Va. Ct. App. 1994) 11

Sparf v. *United States*, 156 U.S. 51 (1895) 17

State v. *Aumick*, 894 P.2d 1325 (Wash. 1995) 12

State v. *Avila*, 710 P.2d 440 (Ariz. 1985) 11

State v. *Barr*, 237 N.W.2d 888 (S.D. 1976) 11

State v. *Bluhm*, 460 N.W.2d 22 (Minn. 1990) 12

State v. *Brown*, 647 A.2d 17 (Conn. App. Ct. 1994) . . . 13

State v. *Bryant*, 670 A.2d 776 (R.I. 1996) 12

State v. *Correa*, 706 P.2d 1321 (Haw. Ct. App. 1985) 11

State v. *Federico*, 510 A.2d 1147 (N.J. 1986) 12

State v. *Forsyth*, 642 P.2d 1035 (Mont. 1982) 12

State v. *Gibson*, 908 P.2d 352 (Utah 1995) 12

TABLE OF AUTHORITIES — Cont'd

Page

State v. *Gunn*, 437 S.E.2d 75 (S.C. 1993), cert. denied, 510 U.S. 1115 (1994) 11

State v. *Jynes*, 652 So. 2d 91 (La. Ct. App. 1995) 11

State v. *Miller*, 400 S.E.2d 611 (W. Va. 1990) 12

State v. *Monroe*, 790 P.2d 1188 (Or. Ct. App. 1990) . . 13

State v. *Moriarty*, 321 N.W.2d 324 (Wis. Ct. App. 1982) 13

State v. *Myers*, 510 N.W.2d 58 (Neb. 1994) 12

State v. *Nason*, 433 A.2d 424 (Me. 1981) 11

State v. *Rhome*, 462 S.E.2d 656 (N.C. Ct. App. 1995) 13

State v. *Teel*, 793 S.W.2d 236, cert. denied, 498 U.S. 1007 (1990) 11

State v. *Watson*, 885 P.2d 1226 (Kan. 1994) 11

State v. *Wright*, 581 A.2d 720 (Vt. 1989), cert. denied, 498 U.S. 1032 (1991) 11

Stewart v. *Wyoming Cattle Ranche Co.*, 128 U.S. 383 (1888) 27

TABLE OF AUTHORITIES — Cont'd

Page

Sullivan v. *Louisiana*, 508 U.S. 275 (1993) . . . . . *passim*

Tanner v. *United States*, 483 U.S. 107 (1987) 25

Teel v. *Tennessee*, 498 U.S. 1007 (1990) 4, 13

United States v. *Bass*, 404 U.S. 336 (1971) 25

United States v. *Campbell*, 64 F.3d 967 (5th Cir. 1995) . 22

United Bhd. of Carpenters v. *United States Bay Counties Dist. Council*, 330 U.S. 395 (1947) 16, 17, 18

United States v. *Cochran*, 109 F.3d 660 (10th Cir. 1997) 5, 8, 23, 24

United States v. *Coffman*, 94 F.3d 330 (7th Cir. 1996), cert. denied, 117 S. Ct. 1426 (1997) 5, 24

United States v. *David*, 83 F.3d 638 (4th Cir. 1996) . 6, 11

United States v. *Davis*, 989 F.2d 244 (7th Cir. 1993) . . 22

United States v. *DeFries*, 129 F.3d 1293 (D.C. Cir. 1997) 6, 12

United States v. *DeSantis*, 134 F.3d 760 (6th Cir. 1998) 22, 24

United States v. *DiRico*, 78 F.3d 732 (1st Cir. 1996) 6, 10

TABLE OF AUTHORITIES — Cont'd

Page

United States v. *Dunn*, 961 F.2d 648 (7th Cir. 1992) . . 22

United States v. *DuPre*, 117 F.3d 810 (5th Cir. 1997) . . 23

United States v. *Fern*, 117 F.3d 1298 (11th Cir. 1997) . 10

United States v. *Faulhaber*, 929 F.2d 16 (1st Cir. 1991) 21

United States v. *Fraza*, 106 929 F.3d 1050 (1st Cir. 1997) 21

United States v. *Gaudin*, 515 U.S. 506 (1993) . . . . *passim*

United States v. *Halbert*, 640 F.2d 1000 (9th Cir. 1981) 22

United States v. *Hollis*, 971 F.2d 1441–(10th Cir. 1992) . 23

United States v. *Jobe*, 101 F.3d 1046 (5th Cir. 1996), cert. denied, 118 S. Ct. 81 (1997) 22

United States v. *Johnson*, 71 F.3d 139 (4th Cir. 1995) . . 12

United States v. *Knapp*, 120 F.3d 928 (9th Cir.), cert. denied, 118 S. Ct. 417 (1997) 6

United States v. *Lanier*, 117 S. Ct. 1219 (1997) 25

United States v. *Laughlin*, 26 F.3d 1523 (10th Cir.), cert. denied, 513 U.S. 965 (1994) 12

TABLE OF AUTHORITIES — Cont'd

Page

United States v. *Lopez*, 71 F.3d 954, 960 (1st Cir. 1995), cert. denied, 518 U.S. 1008 (1996) 14, 21

United States v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977) 17

United States v. *Moser*, 123 F.3d 813 (5th Cir.), cert. denied, 118 S. Ct. 614 (1997) 21

United States v. *Nguyen*, 73 F.3d 887 (9th Cir. 1995) . . 12

United States v. *Nash*, 115 F.3d 1431 (1997), cert. denied, 118 S. Ct. 1054 (1998) . . . 7, 8, 22, 23

United States v. *O'Hagan*, 117 S. Ct. 2199 (1997) 25

United States v. *Parmelee*, 42 F.3d 387 (7th Cir. 1994), cert. denied, 516 U.S. 812 (1995) 4, 13

United States v. *Pettigrew*, 77 F.3d 1500 (5th Cir. 1996) 6, 11

United States v. *Raether*, 82 F.3d 192 (8th Cir. 1996) 6, 10

United States v. *Rodriguez*, 1998 WL 130748 (2d Cir. 1998) 22, 24

United States v. *Sayan*, 968 F.2d 55 (D.C. Cir. 1992) . . 22

TABLE OF AUTHORITIES — Cont'd

Page

United States v. *Shunk*, 113 F.3d 31 (5th Cir. 1997) . . . 23

United States v. *Slaughter*, 128 F.3d 623 (8th Cir. 1997) 5, 23

United States v. *Smith*, 46 F.3d 1223 (1st Cir.), cert. denied, 516 U.S. 864 (1995) 22

United States v. *Von Barta*, 635 F.2d 999 (2d Cir. 1980) 22

United States v. *Wells*, 117 S. Ct. 921 (1997) . . . . *passim*

United States v. *York*, 933 F.2d 1343 (7th Cir.), cert. denied, 502 U.S. 9167 (1991) 22

Vigil v. *State*, 859 P.2d 659 (Wyo. 1993) 12

Waldemer v. *United States*, 98 F.3d 306 (7th Cir. 1996) 6, 11

Walls v. *State*, 560 A.2d 1038 (Del.), cert. denied, 493 U.S. 967 (1989) 12

Yates v. *Evatt*, 500 U.S. 391 (1991) 7, 19

TABLE OF AUTHORITIES — Cont'd

Page

Constitutional Provisions

U.S. CONST. AMEND. V 2

U.S. CONST. AMEND. VI 2

U.S. CONST. ART. III, § 2 2

Statutes

18 U.S.C. § 1014 . . . . . 8, 26, 27

18 U.S.C. § 1341 . . . . . *passim*

18 U.S.C. § 1343 . . . . . *passim*

18 U.S.C. § 1344 . . . . . *passim*

18 U.S.C. § 1961(1)(B) 26

18 U.S.C. § 7206(1) 2, 6, 15, 19

Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) 28

Act of June 8, 1872, ch. 335 & 305, 17 Stat. 323 28

Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130 . . 28

TABLE OF AUTHORITIES — Cont'd

Page

Miscellaneous

37 AM. JUR. 2D *Fraud and Deceit* (1964) 28

G. Chernack, Note, *Silence Cannot Be Harmless: United States v. Rogers*, 106 YALE L.J. 2305 (1997) 20

Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167 (1995) 16

J. Greabe, *Spelling Guilt Out Of A Record? Harmless-Error Review Of Mandatory Presumptions And Elemental Misdescriptions*, 74 B.U. L. REV. 819 (1994) 4

J. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985) 25

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RESTATEMENT (SECOND) OF TORTS (1977) 28

1 J. Story, *Commentaries on Equity Jurisprudence* (1886) 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. _____

ELLIS E. NEDER, JR., PETITIONER,

v.

UNITED STATES, RESPONDENT.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Ellis E. Neder, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-13a) is reported at 136 F.3d 1459. The judgment of the district court (App., *infra*, 14a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Article III, § 2 of the United States Constitution provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "No person shall be * * * deprived of life, liberty, or property, without due process of law." The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." 18 U.S.C. §§ 1341, 1343, 1344, and 26 U.S.C. § 7206(1) are reproduced at App., *infra*, 43a-47a.

STATEMENT

This case presents the important and recurring constitutional question that this Court left open in *United States* v. *Gaudin*, 515 U.S. 506 (1995); *Johnson* v. *United States*, 117 S. Ct. 1544 (1997), and, most recently, in *Rogers* v. *United States*, 118 S. Ct. 673 (1998)—namely, whether the trial court's removal of an element of a charged offense is subject to harmless-error review under *Chapman* v. *California*, 386 U.S. 18 (1967), notwithstanding the defendant's constitutional right to a jury determination of guilt or innocence as to each element of the offense. This case also presents the separate and far-reaching question of whether materiality is an element of the federal mail, wire and bank fraud statutes. On each of these important questions, the courts of appeals are deeply divided and in need of Supreme Court review.

A. In *Rogers* v. *United States*, 118 S. Ct. 673 (1998), this Court granted certiorari to decide whether the omission of

an element of a charged offense from the jury instructions is subject to harmless-error review. After argument, the Court dismissed the petition as improvidently granted on the ground that the question was "not fairly presented by the record." *Id.* at 645. Earlier, in *Johnson* v. *United States*, 117 S. Ct. 1544, 1550 (1997), this Court noted that the answer to the question of whether a *Gaudin* error (the error that occurred here) is subject to harmless-error review is "by no means clear." The Court concluded, however, that it "need not decide that question" because the defendant in *Johnson* (unlike petitioner here) did not timely object to the error at trial.

This case provides the ideal opportunity for the Court "to address [the] important issue of constitutional law" left open in *Rogers*, *Johnson* and *Gaudin*. *Rogers*, 118 S. Ct. at 677 (O'Connor, J., concurring). See also *id.* at 675 (plurality opinion) (same); *Gaudin*, 515 U.S. at 526-27 (Rehnquist, C.J., concurring) (noting that the Court left open the question whether a *Gaudin* error is subject to harmless-error review). As the Eleventh Circuit noted below (App., *infra*, 11a n.10), the courts of appeals are deeply split over whether a *Gaudin* error is subject to harmless-error review. The Second, Eighth and Eleventh Circuits have held that *Gaudin* errors are subject to harmless-error review. See *infra* at 10 n.4 & cases cited therein. The First, Fourth, Fifth, Seventh, Ninth and D.C. Circuits, on the other hand, have held that *Gaudin* errors are immune from harmless-error scrutiny. See *infra* at 10 n.5 & cases cited therein.

This conflict vividly reflects the larger controversy over whether elemental omissions like a *Gaudin* error can ever constitutionally be "harmless." As the Eleventh Circuit explained in *Rogers* v. *United States*, 94 F.3d 1519, 1524 n.11 (1996), cert. dismissed, 118 S. Ct. 643 (1998), "[s]ome circuits have determined that an instructional omission mandates reversal regardless of the circumstances." (Citations omitted).

In contrast, "[o]ther circuits have recognized that this type of mistake will sometimes be amenable to harmless error scrutiny." *Ibid.* (citations omitted). Accordingly, the Seventh, Ninth and Eleventh Circuits each have openly invited Supreme Court review of this issue, and acknowledged "that further guidance and clarification would be extremely helpful." *Ibid.* (citing *Hennessy* v. *Goldsmith*, 929 F.2d 511, 515 n.2 (9th Cir. 1991); *Teel* v. *Tennessee*, 498 U.S. 1007 (1990) (White, J., dissenting from denial of certiorari)).[1] This Court should grant the petition to resolve the conflict on this important and unanswered question of constitutional law.

B. This case also presents the unanswered and widely recurring question of whether materiality is an element of the federal mail, wire and bank fraud statutes, each of which proscribes a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343, 1344. The court of appeals, citing this Court's decision in *United States* v. *Wells*, 117 S. Ct. 921 (1997), held that none of these statutes contain a materiality requirement since none "contain the word 'material.'" App., *infra*, 7a. With this holding, the Eleventh Circuit has deepened the circuit split over this question. The First and Fifth Circuits, for instance, like the Eleventh Circuit, have held that materiality is not an element of

[1] Accord, *e.g.*, *United States* v. *Parmelee*, 42 F.3d 387, 392 & n.7 (7th Cir. 1994) ("the Supreme Court has yet to decide the question whether instructional error of this sort can ever be harmless. * * * [A] conflict of authority exists concerning the availability of harmless-error analysis in this situation. * * * The depth of this conflict underscores the importance of the question. Both considerations counsel for a grant of certiorari"), cert. denied, 116 S. Ct. 63 (1995); J. Greabe, *Spelling Guilt Out Of A Record? Harmless-Error Review Of Mandatory Presumptions And Elemental Misdescriptions*, 74 B.U. L. REV. 819, 844 (1994) (noting that the current state of the law "has fostered predictable confusion in the lower courts").

the wire, mail or bank fraud statutes. See *infra* at 21 n. 10 & cases cited therein. In contrast, the Second, Fourth, Sixth, Ninth and D.C. Circuits have held that materiality is an element of these statutes. See *infra* at 22 n. 11 & cases cited therein.

Adding further to the confusion, the Seventh, Eighth and Tenth Circuits have staked out an indeterminate middle ground. The Eighth and Tenth Circuits have held that "[a]lthough materiality is not an independent element of a wire fraud prosecution, 'there is a materiality *aspect* to the determination whether the acts of an accused give rise to a scheme to defraud' that 'is appropriately submitted to the jury as one component of the larger factual question as to the existence of fraud and a scheme to defraud.'" *United States* v. *Cochran*, 109 F.3d 660, 667 n.3 (10th Cir. 1997) (emphasis added) (citation omitted). See also *United States* v. *Slaughter*, 128 F.3d 623, 629 (8th Cir. 1997) (adopting the Tenth Circuit's approach). The Seventh Circuit, in contrast, has held that while Congress did not "want to classify immaterial lies as frauds for purposes of the mail- and wire-fraud statutes," a jury need not be separately instructed on materiality because "the term 'fraud' embodies the concept of materiality," and thus "[a]n instruction in the language of the statute adequately puts the issue before the jury." *United States* v. *Coffman*, 94 F.3d 330 (7th Cir. 1996), cert. denied, 117 S. Ct. 1426 (1997).

In short, the courts of appeals are irreconcilably split over whether materiality is an element of the mail, wire and bank fraud statutes. Such uncertainty over the elements of criminal statutes is intolerable. This Court should grant the petition to resolve this important and recurring question.

C. Petitioner was charged with multiple counts of federal tax, mail, wire and bank fraud in connection with a series of land acquisition and development transactions. The indictment alleged, among other things, that petitioner

concealed from his lenders certain material facts concerning the source of certain deposit funds and the structure of those transactions, and also that he failed to report certain profits from these transactions in his 1985 and 1986 income tax returns. At trial, "the district court instructed the jury that if it found beyond a reasonable doubt that the alleged statements, representations, or promises were false, it need not consider whether they were material because materiality was not an issue for the jury to decide. The court entered its own findings regarding materiality outside the presence of the jury. Petitioner timely objected to the court's findings and its failure to submit the issue of materiality to the jury." App., *infra*, 3a. See also App., *infra*, 28a, 30a, 34a (excerpts of jury instructions). On direct appeal, the Eleventh Circuit affirmed petitioner's convictions on all counts.

Harmless-Error. As to petitioner's tax fraud conviction under 18 U.S.C. § 7206(1), the Eleventh Circuit acknowledged that under *United States* v. *Gaudin*, 515 U.S. 506 (1995), the district court "erred in not submitting the element of materiality to the jury." App., *infra*, 11a. The court nevertheless held that "*Gaudin* errors do not require automatic reversal but are subject to harmless error analysis," citing decisions from the Second, Seventh, Eighth and Ninth Circuits.[2] The court recognized that its harmless-error holding conflicted with decisions of the First, Fourth, Fifth, Sixth and D.C. Circuits.[3] The Eleventh Circuit

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[2] App., *infra*, 11a n.10 (citing *Bilzerian* v. *United States*, 127 F.3d 237, 242 (2d Cir.1997); *United States* v. *Knapp*, 120 F.3d 928, 932 (9th Cir.), cert. denied, 118 S. Ct. 417 (1997); *Waldemer* v. *United States*, 106 F.3d 729, 732 (7th Cir.1996); *United States* v. *Raether*, 82 F.3d 192, 194 (8th Cir.1996)).

[3] App., *infra*, 11a n.10 (citing *United States* v. *DeFries*, 129 F.3d 1293, 1311-12 & n.13 (D.C. Cir.1997); *United States* v. *David*, 83 F.3d 638, 647 (4th Cir. 1996); *United States* v. *DiRico*, 78 F.3d 732, 737-38 (1st Cir.1996); *United States* v. *Pettigrew*, 77 F.3d 1500, 1511 (5th Cir.1996)).

then proceeded to hold that the trial court's *Gaudin* error was harmless "[b]ecause materiality was not in dispute with respect to Neder's tax fraud offense, [and thus] the district court's *Gaudin* error 'did not contribute to the verdict obtained.'" App., *infra*, 13a (quoting *Yates* v. *Evatt*, 500 U.S. 391, 403 (1991); *Chapman* v. *California*, 386 U.S. 18, 24 (1967)).

Materiality. The Eleventh Circuit affirmed petitioner's mail, wire and bank fraud convictions, but on different grounds. Citing *United States* v. *Wells*, 117 S. Ct. 921 (1997), the court of appeals held that the trial court's directed finding of materiality did not violate petitioner's rights under *Gaudin* because materiality is not an element of those offenses. The court held that materiality is not an element of the mail and wire fraud statutes (§§ 1341 & 1343) because they "do not contain the word 'material.' Further, § 1341 was enacted as part of the recodification of the federal criminal code in 1948, and § 1343 was patterned after § 1341. Based on these factors considered in *Wells*, we conclude that materiality is not an element of fraud offenses in §§ 1341 and 1343." App., *infra*, 7a. The court reached the same conclusion as to the bank fraud statute (§ 1344), because "its language, like § 1343, was patterned after § 1341." *Id.* at 9a.

The Eleventh Circuit acknowledged that unlike the statute in *Wells* (18 U.S.C. § 1014), which prohibits "false statements," §§ 1341, 1343 and 1344 punish a "scheme or artifice" either "to defraud" or to "obtain[]" money or property "by means of false or fraudulent pretenses, representations, or promises." However, rejecting the Ninth Circuit's contrary holding in *United States* v. *Nash*, 115 F.3d 1431, 1436 (1997), cert. denied, 118 S. Ct. 1054 (1998), the court held that the

textual differences between § 1014 and §§ 1341, 1343 and 1344 were irrelevant under *Wells*:

> We disagree with the Ninth Circuit's analysis that since the term "representation" included "some notion of materiality at common law," this indicates that Congress intended for materiality to be an element of the bank fraud statute. * * * This ignores that Congress now has employed the terms "material representation" and "material misrepresentation" in other statutes. The fact that Congress uses the term "material" in conjunction with "representation" or "misrepresentation" in some statutes but not in others rebuts any presumption that Congress now intends to make materiality an element under a statute whenever it employs the term "representation" in that statute.

App., *infra*, 9a. The court rejected as "unpersuasive" the Tenth Circuit's holding in *United States* v. *Cochran*, 109 F.3d 660, 667 n.3 (10th Cir.1997), that "there is a materiality aspect to the determination whether the acts of an accused give rise to a scheme to defraud." App., *infra*, 7a n.4. The court also refused to adopt "the Ninth Circuit's rationale [in *Nash*] that § 1344 targets fraud and, therefore, necessarily includes materiality as an element of bank fraud. This approach is inconsistent with *Wells*, which disfavors inferring a materiality requirement where the statutory language does not expressly include one." *Id.* at 10a. Having concluded that materiality is not an element of §§ 1341, 1343 and 1344, the court of appeals held that the omission of materiality as to those offenses did not violate *Gaudin*, and thus affirmed petitioner's mail, wire and bank fraud convictions.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' HOLDING THAT *GAUDIN* ERRORS ARE SUBJECT TO HARMLESS-ERROR REVIEW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND STATE COURTS OF LAST RESORT.

The court of appeals' decision in this case raises the fundamental question of whether a trial court's removal of an element of a criminal offense from the jury's consideration is subject to harmless-error review where the jury made no findings concerning the omitted element. This Court granted certiorari to decide that question in *Rogers* v. *United States*, 118 S. Ct. 673 (1998), but ultimately determined that the question was "not fairly presented by the record." *Id.* at 645. Similarly, in *Johnson* v. *United States*, 117 S. Ct. 1544, 1550 (1997), this Court noted that the answer to the question presented here was "not at all clear," but concluded that it "need not decide that question" because there was no timely objection to the erroneous instruction, and the case thus was governed by entirely different plain error standards. And in *United States* v. *Gaudin*, 515 U.S. 506 (1995), where this Court held that materiality was a question for the jury, not the court, this Court left open the question of whether a *Gaudin* error is subject to harmless-error review. See *Gaudin*, 515 U.S. at 526-27 (Rehnquist, C.J., concurring).

The question of whether an elemental omission is subject to harmless-error review is vitally significant. The need for Supreme Court review of this issue also is immediate and compelling, since the federal and state courts have deeply split over the answer, and have openly called for Supreme Court guidance. This case provides an ideal opportunity to put this controversy to rest.

A. The Courts of Appeals Are Deadlocked As To Whether *Gaudin* Errors Are Subject To Harmless-Error Review.

As the Eleventh Circuit acknowledged (App., *infra*, 11a-12a & n.10), the circuits are deeply divided over whether a *Gaudin* error (*i.e.*, where materiality is decided by the court and removed from the jury's consideration) is subject to harmless-error review where, as here, defense counsel asserts a timely objection to the constitutional error.

The Eleventh Circuit's holding that *Gaudin* errors are subject to harmless-error review follows similar rulings by the Second and Eighth Circuits.[4] These decisions irreconcilably conflict, however, with decisions of the First, Fourth, Fifth, Seventh, Ninth and District of Columbia Circuits which have held that *Gaudin* errors are immune from harmless-error review so long as the jury does not make findings concerning materiality through its consideration of other elements.[5]

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[4] See, *e.g.*, *Bilzerian* v. *United States*, 127 F.3d 237, 242 (2d Cir. 1997) (holding that "failure to include materiality * * * was harmless here because the evidence overwhelmingly demonstrated that Bilzerian would have been convicted even if the jury had been given the issue of materiality"); *United States* v. *Raether*, 82 F.3d 192, 194 (8th Cir. 1996) ("We conclude *Gaudin* errors are subject to harmless error review"). See also *United States* v. *Fern*, 117 F.3d 1298, 1306 (11th Cir. 1997) ("a *Gaudin* error does not fall within that limited class of errors known as 'structural errors,' *e.g.*, errors 'affecting the framework within which the trial proceeds, rather than simply an error in the trial itself.' To the contrary, a *Gaudin* error is more correctly viewed as analogous to improperly instructing the jury on an element of the offense, an error which is subject to harmless error review") (quoting *Johnson*, 117 S. Ct. at 1: 50).

[5] See, *e.g.*, *United States* v. *DiRico*, 78 F.3d 732, 737-38 (1st Cir. 1996) ("where a jury has not rendered a verdict that addresses every essential element of the charged offense, and therefore has not rendered a verdict on the crime charged, the question of whether the same verdict would have been rendered absent the constitutional error is meaningless. Here, because the jury did not determine whether the government had proven, beyond a reasonable doubt, the existence of an essential factual element of the crime of false subscription (*i.e.*, materiality), there was 'no verdict within the meaning of the Sixth Amendment' and harmless error analysis is inapplicable") (quoting *Sullivan*)); *United States* v. *David*, 83 F.3d 638, 647 (4th Cir. 1996) ("failure to instruct on an element of the crime, where that element cannot be inferred from the other elements actually found by the jury, is an error not susceptible to harmless error analysis"); *United States* v. *Pettigrew*, 77 F.3d 1500, 1511 (5th Cir. 1996) ("[t]he reasoning of *Sullivan* leads inescapably to the same conclusion in the present case. Because the element of materiality was withheld from the jury, the jury rendered no verdict as to that particular element of the offense. Thus, the harmless error analysis is similarly inapplicable"); *Waldemer* v. *United States*, 106 F.3d 729, 731 (7th Cir. 1996) ("if an element of an offense is not actually found by a jury, appellate court musings as to the actions of a hypothetical rational jury cannot render such an error harmless").

This circuit split is not surprising, since the federal circuits and state courts have long been divided over whether the omission of an element of the crime charged is subject to harmless-error review. On the one hand, the Second, Eighth and Eleventh Circuits, and the courts of last resort of nine states, have held that elemental omissions are subject to harmless error review.[6] By contrast, the First, Fourth, Fifth,

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[6] See *supra* at 10 & n.4.. See also, *e.g.*, *State* v. *Avila*, 710 P.2d 440 (Ariz. 1985); *State* v. *Watson*, 885 P.2d 1226 (Kan. 1994); *State* v. *Nason*, 433 A.2d 424 (Me. 1981); *People* v. *Vaughn*, 524 N.W.2d 217 (Mich. 1994); *State* v. *Lopez*, 920 P.2d 1017 (N.M. 1996); *State* v. *Gunn*, 437 S.E.2d 75 (S.C. 1993), cert. denied, 510 U.S. 1115 (1994); *State* v. *Barr*, 237 N.W.2d 888 (S.D. 1976); *State* v. *Teel*, 793 S.W.2d 236, cert. denied, 498 U.S. 1007 (1990); *State* v. *Wright*, 581 A.2d 720 (Vt. 1989), cert. denied, 498 U.S. 1032 (1991). See also *State* v. *Correa*, 706 P.2d 1321 (Haw. Ct. App. 1985); *People* v. *Navarette*, 629 N.E.2d 742 (Ill. App. Ct. 1994); *State* v. *Jynes*, 652 So. 2d 91 (La. Ct. App. 1995); *Mouton* v. *State*, 892 S.W.2d 234 (Tex. Ct. App. 1995); *Smoot* v. *Commonwealth*, 445 S.E.2d 688 (Va. Ct. App. 1994).

Sixth, Seventh, Ninth, Tenth and D.C. Circuits[7], and the courts of last resort of eighteen states, have held that the omission of an element from the jury instructions is immune from harmless-error scrutiny.[8]

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[7] See *supra* at 10 & n.5. See also *United States* v. *DeFries*, 129 F.3d 1293, 1311 n.13 (D.C. Cir. 1997) (holding in RICO case that the "district court's failure to allow the jury to decide the enterprise element was, per se, a reversible error") (citing *Gaudin*); *United States* v. *Johnson*, 71 F.3d 139, 144 (4th Cir. 1995) (omission of element precludes harmless error review because such review would require appellate court to "engage in the type of speculation and hypothesizing censured by the Supreme Court in *Sullivan*"); *Hoover* v. *Garfield Heights Mun. Court*, 802 F.2d 168, 178 (6th Cir. 1986) ("the failure to instruct the jury on an essential element of the crime charged is one of the exceptional constitutional errors to which the *Chapman* harmless error analysis does not apply"); *United States* v. *Nguyen*, 73 F.3d 887, 895 (9th Cir. 1995) (where "the jury was precluded from considering whether an essential element existed," and there was no independent jury determination regarding the omitted element, reversal is required); *United States* v. *Laughlin*, 26 F.3d 1523, 1527 (10th Cir.) ("[f]ailure to instruct on such an essential element as intent or knowledge requires reversal because the 'Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged'"), cert. denied, 513 U.S. 965 (1994).

[8] See, *e.g.*, *People* v. *Kobrin*, 903 P.2d 1027 (Cal. 1995); *People* v. *Mattas*, 645 P.2d 254 (Colo. 1982); *Walls* v. *State*, 560 A.2d 1038 (Del.), cert. denied, 493 U.S. 967 (1989); *Carpenter* v. *Commonwealth*, 771 S.W.2d 822 (Ky. 1989); *Commonwealth* v. *Thomas*, 514 N.E.2d 1309 (Mass. 1987); *State* v. *Bluhm*, 460 N.W.2d 22 (Minn. 1990); *Hunter* v. *State*, 684 So. 2d 625 (Miss. 1996); *State* v. *Forsyth*, 642 P.2d 1035 (Mont. 1982); *State* v. *Myers*, 510 N.W.2d 58 (Neb. 1994); *Lomas* v. *State*, 639 P.2d 551 (Nev. 1982); *State* v. *Federico*, 510 A.2d 1147 (N.J. 1986); *People* v. *Flynn*, 589 N.E.2d 383 (N.Y. 1992); *Slusher* v. *State*, 814 P.2d 504 (Okla. Crim. App. 1991); *State* v. *Bryant*, 670 A.2d 776 (R.I. 1996); *State* v. *Gibson*, 908 P.2d 352 (Utah 1995); *State* v. *Aumick*, 894 P.2d 1325 (Wash. 1995); *State* v. *Miller*, 400 S.E.2d 611 (W. Va. 1990); *Vigil* v. *State*, 859 P.2d 659 (Wyo. 1993). See also *Hereford* v. *State*, 615 So. 2d 1303 (Ala. Crim. App. 1993); *Dawson* v. *State*, 894 P.2d 672 (Alaska Ct. App. 1995); *State* v. *Brown*, 647 A.2d 17 (Conn. App. Ct. 1994); *Jones* v. *State*, 666 So. 2d 995 (Fla. Dist. Ct. App. 1996); *Robinson* v. *State*, 473 S.E.2d 519 (Ga. Ct. App. 1996); *McKinney* v. *State*, 553 N.E.2d 860 (Ind. Ct. App. 1990); *Monk* v. *State*, 619 A.2d 166 (Md. Ct. Spec. App. 1993); *State* v. *Rhome*, 462 S.E.2d 656 (N.C. Ct. App. 1995); *State* v. *Monroe*, 790 P.2d 1188 (Or. Ct. App. 1990); *Commonwealth* v. *Tharp*, 541 A.2d 14 (Pa. Super. Ct. 1988); *State* v. *Moriarty*, 321 N.W.2d 324 (Wis. Ct. App. 1982).

The conflict over whether *Gaudin* errors and other elemental omissions are subject to harmless-error review has also been widely recognized. See, *e.g.*, *Teel* v. *Tennessee*, 498 U.S. 1007 (1990) (White, J., dissenting from denial of certiorari) (noting that "a conflict of authority exists concerning the availability of harmless-error analysis" when a jury is not instructed on an essential element of the crime charged); *Rogers*, 94 F.3d at 1524 n.11 ("We believe that this discord reflects the gravity of the issue, and we realize, of course, that our opinion in this case can merely provide controlling authority within our own Circuit. For these reasons, we join the Ninth Circuit in noting that further guidance and clarification would be extremely helpful"); *Hoover*, 802 F.2d at 176-77 (noting the split in authority and stating that "there is not a clearly preferred answer to the question of whether the failure to instruct on an essential element of the crime charged may be considered harmless"); *Hennessy* v. *Goldsmith*, 929 F.2d 511, 515 n.2 (9th Cir. 1991) (noting that "[t]he law in this area is an unfinished symphony," and that "[a]dditional guidance and clarification would be helpful"); *United States* v. *Parmelee*, 42 F.3d 387, 392 (7th Cir. 1994) (same), cert. denied, 516 U.S. 812 (1995).

In large part, this controversy derives from a fundamental disagreement over the nature and constitutional significance of an instructional omission on an element. Some circuits, like the First and Sixth, hold that a complete instruc-

tional omission is tantamount to a directed verdict by the trial court on the omitted element, and therefore cannot be harmless. See, *e.g.*, *Hoover*, 802 F.2d at 177 ("when an instruction prevents the jury from considering a material issue, it is equivalent to a directed verdict on that issue and therefore cannot be considered harmless"); *United States* v. *Lopez*, 71 F.3d 954, 960 (1st Cir. 1995) (same), cert. denied, 518 U.S. 1008 (1996). Other courts, like the Eleventh Circuit, have expressly rejected this view, refusing to "equate an instructional omission with a directed verdict" on the ground that "failure to instruct on a particular element does not completely prohibit the jury from considering evidence relevant to that issue." *Rogers*, 94 F.3d at 1526 n.13. See also *Hennessy* v. *Goldsmith*, 929 F.2d 511, 515 (9th Cir. 1991) (refusing to equate failure to instruct the jury on an essential element with a directed verdict on that element).

Whatever the answer, the prejudice to petitioner and others resulting from this split of authority is plain. Had petitioner resided in any of the eight circuits that refuse to apply harmless-error analysis to *Gaudin* errors and other elemental omissions, his tax fraud conviction would have been reversed, entitling him to a new trial before a properly instructed jury.

It also is apparent that absent Supreme Court review, this question will undoubtedly continue to plague the state and federal courts in *Gaudin* and other cases where elements have been removed from the jury's consideration. Given the sheer volume of recent cases decided by the state and federal courts of appeals addressing this important issue, without any consensus, there is also no reason to believe that the lower courts will be able to resolve their disagreement without Supreme Court guidance. Review by this Court thus is warranted "to address this important issue of constitutional law." *Rogers*, 118 S. Ct. at 677 (O'Connor, J., concurring).

B. The Court of Appeals' Holding Squarely Conflicts With This Court's Harmless-Error Decisions.

It is undisputed that materiality is an element of the tax fraud offense (26 U.S.C. § 7206(1)) of which petitioner stands convicted. It also is uncontested that the district court explicitly removed that element from the jury's consideration by (1) deciding that element itself, (2) charging the jury in its tax fraud instruction that the jury "need not consider" materiality, and (3) instructing that materiality "is not a question for the jury to decide." App., *infra*, 34a. Thus, as the court of appeals held, the trial court clearly violated petitioner's constitutional right to a jury trial under *United States* v. *Gaudin*, 515 U.S. 506 (1995). The court of appeals concluded, however, that this constitutional error was subject to harmless-error review, and in fact was harmless based on its review of the record evidence. App., *infra*, 13a.

The court of appeals' use of the "harmless error" doctrine to supply a finding that the jury never made cannot be reconciled with this Court's decisions that consistently have safeguarded the defendant's right to a jury determination on *all* essential elements of the offense charged. See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). Under *Sullivan*, the trial court's failure to instruct the jury on an element of an offense, and the jury's resultant failure to determine whether that element was established beyond a reasonable doubt, cannot constitutionally be "harmless" regardless of an appellate court's perception of the record or its certainty of guilt.

A criminal defendant's constitutional right to a trial by jury "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan*, 508 U.S. at 277. Accord *United Bhd. of Carpenters* v. *United States Bay Counties Dist. Council*, 330 U.S. 395, 409-10 (1947) ("guilt is determined by the jury,

not the court"). As Justice Frankfurter explained for the Court more than 50 years ago:

> In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.

Bollenbach v. *United States*, 326 U.S. 607, 615 (1946). See also Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1191 (1995).

The Constitution "gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *Gaudin*, 515 U.S. at 522-23. Accord *In re Winship*, 397 U.S. 358, 364 (1970) ("we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with he is charged"). This is a right that cannot be made to depend upon a court's perception of the defendant's guilt or the weight of the record evidence.[9] A court "may not direct a

[9] If the instructional omission does not prevent the reviewing court from concluding, beyond a reasonable doubt, "that the jury actually made the finding that inheres in the [omitted] element," then harmless error review may be applied. See *California* v. *Roy*, 117 S. Ct. 337, 339-40 (1996) (Scalia, J., concurring) (citing *Carella*, 491 U.S. at 271 (Scalia, J., concurring in the judgment)). But, as noted *supra* at 15, this case does not involve one of those "rare situations" where what the jury found can fairly be said to encompass what it was told not to find. *Carella*, 491 U.S. at 270

verdict for the State, no matter how overwhelming the evidence." *Sullivan*, 508 U.S. at 277. Accord, *e.g.*, *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977) ("a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction") (citing *Carpenters*, 330 U.S. at 408; *Sparf* v. *United States*, 156 U.S. 51, 105 (1895)).

In confronting the question of whether, and to what extent, instructional errors are amenable to harmless-error scrutiny, the Court consistently has adhered to the bedrock principle that an appellate court may not serve as the finder of fact. In *Carpenters*, for instance, the trial court misdescribed an element by failing to properly charge the jury that a labor union could be convicted of an antitrust conspiracy only if the union actively participated in the unlawful acts in question. Because the trial court's error completely foreclosed the jury's consideration of whether the defendants had actively participated in the conspiracy—an element of the crime charged—the Court refused to analyze or weigh the record evidence of active participation, notwithstanding its apparent strength. 330 U.S. at 408-09.

In contrast to the circumstances presented in *Carpenters*, it is possible that a jury, while misinstructed on an element, may nonetheless find the facts necessary to establish the proper element beyond a reasonable doubt. For instance, in *Pope* v. *Illinois*, 481 U.S. 497 (1987), the jury was instructed that it should base its determination of whether the materials at issue

(quoting *Connecticut* v. *Johnson*, 460 U.S. 73, 87 (1983) (plurality opinion)). The trial court expressly instructed the jury that materiality "was not for the jury to decide," and itself directed a finding of materiality in favor of the prosecution. App., *infra*, 34a.

were obscene upon how ordinary adults in the State of Illinois would view the material. The Court ruled that this instruction was flawed under the First Amendment, because obscenity should be judged not from the perspective of "an ordinary member of any given community," but rather from that of "a reasonable person." *Id.* at 500-501. The Court remanded the case to the state appellate court to determine whether the error was harmless. *Id.* at 504. As Justice Scalia later explained, the error in *Pope* was subject to harmless-error review because "no rational juror could plausibly have found the magazines utterly lacking in value under a community standard and come to a different conclusion under a reasonable person standard." *Carella*, 491 U.S. at 271 (concurring opinion). Thus, the appellate court in *Pope* validly could conclude that the jury *actually found* the required element notwithstanding its misdescription in the jury instructions.

Read in tandem, *Carpenters* and *Pope* demonstrate that, at least analytically, the wholesale omission of an element is "as easily characterized as a 'misdescription of an element' of the crime, as it is characterized as an error of 'omission.'" *California* v. *Roy*, 117 S. Ct. 337, 339 (1996) (per curiam). Indeed, as this Court noted in *Johnson*, 117 S. Ct. at 1550, "[t]he failure to submit materiality to the jury, as in this case, can just as easily be analogized to improperly instructing the jury on an element of the offense * * *, an error which is subject to harmless-error analysis, as it can be to failing to give a proper reasonable-doubt instruction altogether." (Citations omitted). Omissions and misdescriptions each can "deprive[] the jury of its factfinding role" and thus will "circumscribe the availability of harmless-error analysis." *Carella*, 491 U.S. at 269, 270 (Scalia, J., concurring). But in either event, the instructional error can be subject to harmless-error scrutiny *only* when the predicate facts found by the jury under the instructions actually given "are so closely related" to

the element omitted by the trial court "that no rational jury could find those facts without also finding" the facts necessary to establish the omitted element beyond a reasonable doubt, such that "making those findings is functionally equivalent to finding the [omitted] element." *Sullivan*, 508 U.S. at 281.

The Eleventh Circuit's decision cannot be reconciled with the Court's harmless-error decisions. The court of appeals acknowledged "[t]he district court * * * erred in not submitting the element of materiality to the jury regarding Neder's § 7206(1) offenses" (App., *infra*, 10a), and that the jury never made any findings concerning materiality. The court nevertheless declared harmless the removal of materiality from the jury instructions. The court justified its use of the harmless-error doctrine by concluding that because "materiality was not in dispute," the trial court's directed finding of materiality in favor of the prosecution "'did not contribute to the verdict obtained." App., *infra*, 13a (quoting *Yates* v. *Evatt*, 500 U.S. 391, 403 (1991)). Such reasoning, however, reflects a fundamental misunderstanding of the harmless-error doctrine.

The reason why the harmless-error doctrine cannot be applied in this case has *nothing* to do with the weight of the evidence, or whether materiality was actively disputed at trial (which it was). It is inapplicable because without a complete jury verdict on each element of the offense charged, "there has been no jury verdict within the meaning of the Sixth Amendment, [and] the entire premise of *Chapman* review is simply absent." *Sullivan*, 508 U.S. at 280. As Justice Scalia has explained, "[t]he absence of a formal verdict on [each element] can not be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise. To allow the error to be cured in that fashion would be to dispense with trial by jury." *Roy*, 117 S. Ct. at 339 (concurring opinion).

The court of appeals reversibly erred in applying the harmless-error doctrine to the *Gaudin* error below. Harmless-error review has no place where the jury never made a constitutionally valid determination of guilt on each element of the offense charged. Without a complete verdict, "the conviction must be reversed, no matter how inescapable the findings to support that verdict might be." *Roy*, 117 S. Ct. at 339 (Scalia, J., concurring). Accord *Old Chief* v. *United States*, 117 S. Ct. 644, 659 (1997) (O'Connor, J., dissenting) (same). See also G. Chernack, Note, *Silence Cannot Be Harmless: United States* v. *Rogers*, 106 YALE L.J. 2305, 2309 (1997) ("By completely undermining the promise of trial by jury, an omitted instruction should lead to automatic reversal").

In short, regardless of the Eleventh Circuit's perception of the record, petitioner's tax fraud conviction cannot stand for the simple reason that one of the essential elements of the offense with which he was changed was decided *not* by the jury, but by the court. Such an error cannot constitutionally be harmless, for "'the error in such a case is that the wrong entity judged the defendant guilty.'" *Sullivan*, 508 U.S. at 280 (quoting *Rose*, 478 U.S. at 578). The Eleventh Circuit's affirmance of petitioner's tax fraud conviction must be reversed.

II. THE ELEVENTH CIRCUIT'S HOLDING THAT MATERIALITY IS NOT AN ELEMENT OF THE FEDERAL MAIL, WIRE AND BANK FRAUD STATUTES CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND OF THIS COURT.

A. The Courts of Appeals Are Deeply Split As To Whether Materiality Is An Element Of Federal Mail, Wire And Bank Fraud.

Although the trial court removed materiality from the jury's consideration, the court of appeals affirmed petitioner's mail, wire and bank fraud convictions on the ground that materiality is not an element of any of those statutes, and that

no *Gaudin* error thus was committed. As demonstrated below, the Eleventh Circuit's decision conflicts with those of at least three other circuits that have held that materiality is an element of these statutes. Accordingly, and because decisions of the courts of appeals truly reflect a *striking* degree of confusion as to this important question, Supreme Court review is warranted.

The operative language of the mail, wire and bank fraud statutes is essentially the same. Each punishes a "scheme or artifice" either "to defraud" or to "obtain[]" money or property "by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343, 1344. Citing this Court's decision in *United States* v. *Wells*, 117 S. Ct. 921 (1997), the court of appeals held that materiality is not an element of these offenses, but recognized that the circuits have been unable to reach agreement on this question. See, *e.g.*, App., *infra*, 7a n.4, 9a-10a (noting conflicting authority); *United States* v. *Lopez*, 71 F.3d 954, 962 (1st Cir. 1995) (noting that the First Circuit's "position is at odds with some circuits and with both of the standard instruction treatises"), cert. denied, 518 U.S. 1008 (1996). This conflict has only deepened further since *Wells* was decided.

The court of appeals' holding that materiality is not an element of the mail, wire and bank fraud offenses follows similar pre-*Wells* decisions from the First and Fifth Circuits.[10]

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[10] See, *e.g.*, *United States* v. *Faulhaber*, 929 F.2d 16, 18 (1st Cir. 1991) (district court did not err in failing to instruct jury on materiality in prosecution under §§ 1341 and 1344); *United States* v. *Fraza*, 106 F.3d 1050, 1053 (1st Cir. 1997) (holding that § 1344 does not require "proof that the statements were 'materially false'"); *Abell* v. *Potomac Ins. Co.*, 858 F.2d 1104, 1129 (5th Cir. 1988) ("[m]ateriality and reliance . . . are not elements of either wire fraud or mail fraud"), vacated on other grounds, 492 U.S. 914 (1989); *United States* v. *Moser*, 123 F.3d 813, 826 (5th Cir.) (same), cert. denied, 118 S. Ct. 642 (1997).

However, the Eleventh Circuit's holding is squarely at odds with other decisions of these Circuits, and with rulings from the Second, Sixth, Seventh, Ninth, Tenth and D.C. Circuits (both before and after *Wells*) which have held that materiality *is* an element of the mail, wire and bank fraud offenses.[11]

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[11] See, *e.g.*, *United States* v. *Smith*, 46 F.3d 1223, 1236 (1st Cir.) ("We agree that § 1344(2) requires a material misrepresentation."), cert. denied, 516 U.S. 864 (1995); *United States* v. *Von Barta*, 635 F.2d 999, 1006 n.14 (2d Cir. 1980) (in mail fraud prosecution, "the deceit must have gone to the nature of the bargain; that is, any nondisclosures or affirmative misrepresentations must have been material") (citation omitted), cert. denied, 450 U.S. 998 (1981); *United States* v. *Jobe*, 101 F.3d 1046, 1061 (5th Cir. 1996) (§ 1344 has "up to now clearly incorporated a materiality element"), cert. denied, 118 S. Ct. 81 (1997); *Central Distribs. of Beer* v. *Conn*, 5 F.3d 181, 184 (6th Cir. 1993) (plaintiff "cannot maintain a civil RICO claim" alleging mail fraud and wire fraud as predicate acts "absent evidence that the defendants made misrepresentations or omissions of material fact"), cert. denied, 512 U.S. 1207 (1994); *United States* v. *DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998) (under § 1341, "a defendant must knowingly make a material misrepresentation or knowingly omit a material fact"); *United States* v. *Dunn*, 961 F.2d 648, 651 (7th Cir. 1992) (in mail fraud prosecution, "the government must prove that the defendant has knowingly made a 'material misrepresentation or omission'") (quoting *United States* v. *York*, 933 F.2d 1343, 1349 (7th Cir.), cert. denied, 502 U.S. 916 (1991)); *United States* v. *Davis*, 989 F.2d 244, 247 (7th Cir. 1993) (acquittal was required under § 1344(2) because "the government failed to prove that Davis's misrepresentation * * * was material"); *United States* v. *Halbert*, 640 F.2d 1000, 1008 (9th Cir. 1981) ("a requirement of materiality should apply to the misrepresentations which form the basis for a mail fraud violation"); *United States* v. *Nash*, 115 F.3d 1431, 1436 (9th Cir. 1997) (holding that "the materiality requirement for section 1344 * * * survives *Wells*"), cert. denied, 118 S. Ct. 1054 (1998); *United States* v. *Sayan*, 968 F.2d 55, 61 n.7 (D.C. Cir. 1992) (§ 1344(2) "require[s] a material misrepresentation"). See also, e.g., *United States* v. *Rodriguez*, 1998 WL 130748, *4 (2d Cir. 1998) ("the misrepresentations must be material to give rise to liability under" § 1344); *United States* v. *Campbell*, 64 F.3d 967, 975 (5th Cir. 1995) ("Under § 1344(2), the defendant must make a material misrepresentation to the bank"); *United States* v. *Hollis*, 971 F.2d 1441, 1452 (10th Cir. 1992) (under § 1344, "[c]ertainly * * * if the misrepresentations were immaterial, then the defendant has a valid defense"), cert. denied, 507 U.S. 985 (1993)..

Other circuits have taken an intermediate approach, staking out an indeterminate middle ground between those decisions that clearly identify materiality as an element of these statutory offenses and those that reject a materiality requirement. For instance, the Tenth Circuit has held that while wire fraud requires a "showing of materiality," materiality is not actually an "independent element" of the offense. *United States* v. *Cochran*, 109 F.3d 660, 667 & n.3 (10th Cir. 1997). The court explained:

> Although materiality is not an independent element of a wire fraud prosecution, there is a materiality aspect to the determination whether the acts of an accused give rise to a scheme to defraud that is appropriately submitted to the jury as one component of the larger factual question as to the existence of fraud and a scheme to defraud.

Id. at 667 n.3 (internal quotations omitted). See also *United States* v. *Slaughter*, 128 F.3d 623, 629 (8th Cir. 1997) ("We join our sister court in the Tenth Circuit in finding that materiality is not a separate essential element of wire fraud"). The Seventh Circuit, on the other hand, has held that while § 1343 requires a showing of materiality, because Congress did not "want to classify immaterial lies as frauds for purposes of the mail- and wire-fraud statutes," there is no need to instruct the jury separately on materiality since "the term 'fraud' embodies the concept of materiality" and "[a]n instruction in the language of the statute adequately puts the issue before the jury." *United States* v. *Coffman*, 94 F.3d 330 (7th Cir. 1996), cert. denied, 117 S. Ct. 1426 (1997).

The circuit split over this issue has deepened further since *Wells*. Indeed, the Eleventh Circuit below openly recognized that its decision conflicts with other post-*Wells* cases. App., *infra*, 7a n.4, 9a-10a. On the one hand, like the Eleventh Circuit, the Fifth Circuit has agreed that *Wells* "casts doubt" on earlier cases holding that materiality is an element of § 1344. *United States* v. *DuPre*, 117 F.3d 810, 815 (5th Cir. 1997), cert. denied, 118 S. Ct. 857 (1998). The Ninth and Tenth Circuits, however, have explicitly held that *Wells* has no bearing on the question of whether materiality is an element of the mail, wire and bank fraud offenses. See, *e.g.*, *Nash*, 115 F.3d at 1436 ("the materiality requirement for section 1344 * * * survives *Wells*"); *Cochran*, 109 F.3d at 667 n.3 (*Wells* "is not to the contrary" of the Tenth Circuit's view that there is a "materiality aspect" to § 1343). *Cf. United States* v. *Shunk*, 113 F.3d 31, 34 (5th Cir. 1997) (holding that materiality remains an element of 18 U.S.C. § 1006 because *Wells* "deal[s] with a different section"). In further contrast, other post-*Wells* decisions have held that materiality is an element of these crimes without any mention of *Wells* at all. See, *e.g.*, *United States* v. *Rodriguez*, 1998 WL 130748, *4 (2d Cir. 1998) ("misrepresentations must be material" under § 1344); *DeSantis*, 134 F.3d at 764 (§ 1341 requires a "material misrepresentation" or the omission of a "material fact").

In short, the circuits are thoroughly confused as to whether materiality is an element of the federal mail, wire and bank fraud statutes. Yet, as statutes whose violation can lead to criminal sanctions, such glaring uncertainty over their elements is intolerable, for it denies "the populace 'fair warning' of the line between criminal and lawful activity." *McElroy* v. *United States*, 455 U.S. 642, 658 (1982). As Justice Holmes wrote in *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931), "[a] fair warning should be given to the world in language that the common world will understand, of what the law intends to do

if a certain line is passed." Accord *United States* v. *Lanier*, 117 S. Ct. 1219, 1225 (1997) (describing the "fair warning" requirement as an essential ingredient of due process).

Under the Constitution, it is also unacceptable for the elements of a federal criminal offense to vary depending upon the circuit in which the defendant happens to reside. Indeed, to allow the elements of these criminal offenses arbitrarily to depend upon the law of each circuit would violate the well-established canon that "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States* v. *Bass*, 404 U.S. 336, 348 (1971). Accord *Crandon* v. *United States*, 494 U.S. 152, 158 (1990) (same); J. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 195 (1985) ("Judicial crime creation is a thing of the past. It is both unacceptable and unnecessary").

Given the frequency of mail, wire and bank fraud prosecutions (see, *e.g.*, *Carpenter* v. *United States*, 484 U.S. 19 (1987); *United States* v. *O'Hagan*, 117 S. Ct. 2199 (1997); *McNally* v. *United States*, 483 U.S. 350 (1987); *Schmuck* v. *United States*, 489 U.S. 705 (1989); *Tanner* v. *United States*, 483 U.S. 107 (1987)), the question of whether materiality is an element of §§ 1341, 1343 and 1344 is certain to recur. Resolution of this question also will be significant in civil cases, since "the large majority of civil RICO complaints use mail fraud, wire fraud or securities fraud as the required predicate offenses." *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 149 (1987). See also, *e.g.*, *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985); *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992); 18 U.S.C. § 1961(1)(B). The Court should grant the petition to resolve this crucial question and bring needed clarity to this important area of the law.

B. The Court Of Appeals' Materiality Holding Is Contrary To This Court's Statutory And Common Law Decisions That Consistently Have Found Materiality To Be An Essential Element Of Fraud.

In holding that materiality is not an element of the mail, wire and bank fraud offenses, the Eleventh Circuit relied entirely on this Court's recent decision in *Wells*, 117 S. Ct. at 926-28, which held that materiality is not an element of 18 U.S.C. § 1014. The court of appeals concluded that materiality is not an element of §§ 1341, 1343 and 1344 for two reasons. *First*, it relied heavily on the fact that these statutes "do not contain the word 'material.'" App., *infra*, 7a. *Second*, the court noted that § 1341, which served as the model for §§ 1343 and 1344, "was enacted as part of the recodification of the federal criminal code in 1948." *Ibid.* As demonstrated below, the Eleventh Circuit's materiality holding is plainly wrong, and reflects a fundamental misreading of *Wells*.

1. Unlike §§ 1341, 1343 and 1344, which proscribe a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," *Wells* involved the application of 18 U.S.C. § 1014, which prohibits certain "false statement[s]" to federally insured banks. In holding that the term "false statement" does not include a materiality component, *Wells* first reaffirmed the presumption that "Congress incorporates the common-law meaning of the terms it uses if those 'terms * * * have accumulated settled meaning under * * * the common law.'" 117 S. Ct. at 927 (quoting *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 322 (1992)). But finding no evidence that the term "false statement" carried any common law meaning, or that Congress intended that term to require proof of materiality, the Court held that materiality was not an element of § 1014. *Wells*, 117 S. Ct. at 926-28.

Nothing in *Wells*, however, even remotely suggests that materiality is not an element of §§ 1341, 1343 and 1344. To the contrary, *Wells*' reaffirmation of the rule that common law statutory terms convey their common law meaning inexorably leads to the conclusion that materiality is an element of the federal mail, wire and bank fraud offenses.

Unlike the "false statement" statute in *Wells*, §§ 1341, 1343 and 1344 each explicitly prohibits "fraud." In particular, they punish a "scheme or artifice" either "to defraud" or to "obtain[]" money or property "by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343, 1344. The mail fraud statute, which served as the model for the wire and bank fraud statute, was crafted in 1872 as "a general proscription against using the mails to initiate correspondence in furtherance of 'any scheme or artifice to defraud.'" *McNally* v. *United States*, 483 U.S. 350, 356 (1987). As this Court explained in *Carpenter* v. *United States*, 484 U.S. 19 (1987), "the words 'to defraud' in the mail fraud statute have the 'common understanding' of 'wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'" *Id.* at 27 (quoting *McNally*, 483 U.S. at 358 (quoting *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)). See also *Durland* v. *United States*, 161 U.S. 306, 312 (1896).

The "common understanding" of "fraud" has always included materiality as one of its essential elements. For more than a century, this Court has emphasized "the fact that actionable fraud requires a material misrepresentation or omission." *BMW* v. *Gore*, 517 U.S. 559, 579 (1996) (citing RESTATEMENT (SECOND) OF TORTS § 538 (1977); W. Keeton, et al., *Prosser & Keeton on Law of Torts* § 108 (5th ed. 1984)). See also *Smith* v. *Richards*, 38 U.S. (13 Pet.) 26, 39 (1839) (a "misrepresentation must be of something *material*, constituting

an inducement or motive * * * to purchase, and by which [the aggrieved party] has been actually misled to his injury") (emphasis added); *Stewart* v. *Wyoming Cattle Ranche Co.*, 128 U.S. 383, 388-89 (1888) (same); 1 J. Story, *Commentaries on Equity Jurisprudence* § 271 (1886) ("[t]he materiality of the alleged fraudulent statements * * * is one of the necessary ingredients of the offence"); *id.* §§ 260-61, 267-71. It is black-letter law that "one of the fundamental principles which pervades jurisprudence involving fraud, and the maintenance of actions or defenses based thereon, is that to constitute fraud in any case, the facts misrepresented or concealed must have been material facts which substantially affect the interests of the person alleged to have been defrauded." 37 AM. JUR. 2D *Fraud and Deceit* § 177, at 236-37 (1964) (collecting cases).

Against this common law backdrop, it is no surprise that this Court has held that materiality to be an element of other statutes that prohibit fraud but do not mention the word "material." For instance, this Court has held that materiality is an element of securities fraud statutes such as § 10(b) of the Securities Exchange Act of 1934, which prohibits "any manipulative or deceptive device or contrivance" but makes no mention of "materiality." See, *e.g.*, *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988); *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 474 (1977). See also 7 L. LOSS & J. SELIGMAN, *Securities Regulation* 3421-31 (3d ed. 1991) (noting that materiality is an essential element of securities fraud).

By leaping to the conclusion that §§ 1341, 1343 and 1344 contain no materiality requirement simply because they do not use the word "material," the Eleventh Circuit misapplied this Court's decision in *Wells* and overlooked the fact that unlike the statute in *Wells*, the statutes here explicitly prohibit "fraud," a term whose common law meaning always has required proof of a material misrepresentation or omission.

2. The court of appeals also wrongly relied on the fact that the mail fraud statute (§ 1341) was recodified as part of the Federal Criminal Code in 1948. It is certainly true that *Wells* relied on the fact that § 1014 was recodified in 1948 as a conglomeration of 13 earlier statutes, 10 of which had never required materiality. 117 S. Ct. at 928. Here, on the other hand, § 1341 was merely *renumbered* in 1948. The mail fraud statute, originally enacted in 1872,[12] and amended in 1909,[13] has *always* targetted "fraud," and was recodified in 1948 without *any* substantive change in its language or scope. As the Senate Report explained, the purpose of the recodification was simply to "correct[] typographical and other minor errors, and clarif[y] the language of some sections to conform more closely to the original law, or to remove ambiguities which have been discovered." S. Rep. No. 303, 81st Cong., 1st Sess. (1949), reprinted in 1949 U.S.C.C.A.N. 1248, 1248. Thus, the Eleventh Circuit's reliance on the fact that "§ 1341 was enacted as part of the recodification of the federal criminal code in 1948" (App., *infra*, 7a) is wholly misplaced.

In sum, the Eleventh Circuit's holding that materiality is not an element of 18 U.S.C. §§ 1341, 1343 and 1344 is patently erroneous and should be reversed.

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[12] See Act of June 8, 1872, ch. 335, § 305, 17 Stat. 283, 323 (applicable to "any person having devised or intending to devise any scheme or artifice to defraud" through the use of the mails).

[13] See Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130 ("Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * *, or any scheme or artifice to obtain money by or through correspondence * * *, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement * * * in any post-office * * * shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ELLIS E. NEDER, Jr., Defendant-Appellant.

No. 92-2929.

March 19, 1998.

Noel G. Lawrence, Jacksonville, FL, for Defendant-Appellant.

Stephen Kunz, Charles Truncale, Jacksonville, FL, Tamra Phipps, Asst. U.S. Atty., Tampa, FL, for Plaintiff-Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT and HULL, Circuit Judges, and KRAVITCH, Senior Circuit Judge.

HULL, Circuit Judge:

Appellant Ellis E. Neder, Jr. appeals his convictions on various false statement, fraud, conspiracy, and racketeering offenses. Neder contends that the district court erred in failing to submit the issue of materiality to the jury with respect to his fraud and false statement offenses.[1] After review, we affirm.

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[1] Neder also asserts that (1) the counts in the indictment were multiplicious and duplicitous, (2) the district court erred in denying his motion for change of venue based on pre-trial publicity, (3) there was insufficient evidence to convict, (4) the district court made erroneous evidentiary rulings, (5) the prosecutor suborned perjury and engaged in a

I. FACTS

A. Neder's Fraudulent Activities

Between 1984 and 1988, Neder engaged in fraudulent activities related to land acquisition, land development, and construction projects. Through his schemes, Neder fraudulently obtained over $30 million in loans from various lending institutions. Neder deposited approximately $7 million in profits on these transactions into his personal account. Testimony at trial revealed that none of the loans would have been approved had the lending institutions been aware of the true nature of the transactions. Neder later defaulted on these loans.

Neder also failed to report income of $1,372,360 in 1985 and $4,355,766 in 1986. Neder does not contest that he did not report this money as income or profits from one of his schemes. Instead, Neder testified that he was advised that he was not required to report this money as income.

B. The Court's Jury Charge

Neder was indicted for mail fraud, wire fraud, bank fraud, tax fraud, and making illegal false statements. The indictment contained materiality as an element of many of these offenses. Neder and the government submitted proposed jury instructions relating to the elements of the charged offenses. The district court's final jury charge included "materiality" as an element of the fraud and false statement offenses. However, the district court instructed the jury that if it found beyond a

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pattern of misconduct, (6) prosecutorial misconduct and various trial errors combined to violate his due process rights, and (7) the government is precluded from arguing that materiality is not an element of Neder's false statement and fraud offenses. After review, we conclude that these contentions are without merit.

reasonable doubt that the alleged statements, representations, or promises were false, it need not consider whether they were material because materiality was not an issue for the jury to decide. The court entered its own findings regarding materiality outside the presence of the jury. Neder timely objected to the court's findings and its failure to submit the issue of materiality to the jury.

II. DISCUSSION

We examine (a) whether materiality is an element of the false statement, wire fraud, mail fraud, bank fraud, and tax fraud offenses;[2] and (b) whether the district court committed reversible error in not submitting the materiality issues to the jury.

A. False Statements: 18 U.S.C. § 1014

Two recent Supreme Court decisions begin our analysis. In *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), the Supreme Court assumed materiality to be an element under 18 U.S.C. § 1001, which proscribes certain false statements, and held that the issue of materiality under § 1001 is for the jury, not the judge, to decide. The district judge in *Gaudin* erroneously failed to submit the materiality issue to the jury. Id. at 523, 115 S.Ct. at 2320. We have since referred to this type of error as a *Gaudin* error. See, *e.g.*, *United States v. Fern*, 117 F.3d 1298, 1307 (11th Cir.1997).

Two years later in *United States v. Wells*, ___ U.S. ___, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997), the Supreme Court

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[2] Neder's conspiracy and RICO convictions under 18 U.S.C. §§ 371 and 1962 were based on Neder's violations of the false statement and fraud statutes. In affirming Neder's convictions under the false statement and fraud statutes, we affirm Neder's conspiracy and RICO convictions as well.

held that materiality is not an element of the false-statement offense in 18 U.S.C. § 1014. Thus, the Court concluded that the district court had not erred in not submitting the question of materiality to the jury. Synthesizing *Gaudin* and *Wells*, if materiality is not an element, failing to submit the issue to the jury is not error; but if materiality is an element, a court errs in failing to submit the issue to the jury.

In deciding in *Wells* that materiality is not an element under § 1014, the Supreme Court focused on the language of § 1014, which states:

> Whoever knowingly makes any false statement or report ... for the purpose of influencing in any way the action of ... any institution the accounts of which are insured by the Federal Deposit Insurance Corporation ... shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both....

18 U.S.C. § 1014. The Supreme Court emphasized that the text of § 1014 does not mention materiality:

> Nowhere does [§ 1014] further say that a material fact must be the subject of the false statement or so much as mention materiality. To the contrary, its terms cover "any" false statement that meets the other requirements in the statute, and the term "false statement" carries no general suggestion of influential significance....

Wells, ___ U.S. at ___, 117 S.Ct. at 927.

The Supreme Court also acknowledged the presumption that "Congress incorporates the common-law meaning of the terms it uses if those 'terms have accumulated settled meaning

under ... the common law.'" *Id.* (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322, 112 S.Ct. 1344, 1348, 117 L.Ed.2d 581 (1992)). However, the Supreme Court concluded that the respondents had failed to make any showing that the term "false statement" acquired any implication of materiality at common law. *Id.*

Finally, the Supreme Court determined that the legislative history of § 1014 supported its natural reading. *Id.* at ___, 117 S.Ct. at 928. Of particular significance was the fact that "[w]hen Congress originally enacted § 1014 as part of its recodification of the federal criminal code in 1948, it explicitly included materiality in other provisions involving false representations." *Id.* Moreover, "of the 13 provisions brought together by § 1014, 10 had previously contained no express materiality provision and received none in the recodification, while 3 of the 13 had contained express materiality requirements and lost them in the course of consolidation." *Id.* The Court concluded that "[t]he most likely inference in these circumstances is that Congress deliberately dropped the term 'materiality' without intending materiality to be an element of § 1014." *Id.*

In this case, Neder's § 1014 conviction is controlled by Wells's holding that materiality is not an element under § 1014. Therefore, the district court did not commit a Gaudin error in failing to submit the issue of materiality to the jury because materiality is not an element of a § 1014 offense.[3]

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[3] We recently relied on *Wells* in determining that materiality is not an element under 15 U.S.C. § 645(a) in *United States v. Condon*, 132 F.3d 653, 656 (11th Cir.1998), or 18 U.S.C. § 1010 in *United States v. DeCastro*, 113 F.3d 176, 179 (11th Cir.1997).

B. Mail Fraud And Wire Fraud: 18 U.S.C. §§ 1341 And 1343

We now turn to whether materiality is an element under §§ 1341 and 1343. As an initial matter, we examine the pre-Wells decisions of this court regarding the elements of §§ 1341 (mail fraud) and 1343 (wire fraud). Our decisions list the elements of these offenses without listing materiality as one of the elements. See *United States v. Pitt*, 717 F.2d 1334, 1339-40 (11th Cir.1983) (listing elements of wire fraud without including materiality); *United States v. Scott*, 701 F.2d 1340, 1343 (11th Cir.1983) (listing elements of mail fraud without including materiality). However, no cases directly hold that materiality is not an element under §§ 1341 and 1343.

Therefore, in determining whether materiality is an element under §§ 1341 and 1343, we begin with the Supreme Court's admonition to examine the statutes' language. Section 1341 proscribes the act or acts of using the mails to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises...." 18 U.S.C. § 1341; see also *United States v. Ethridge*, 948 F.2d 1215, 1216 (11th Cir.1991). The text of § 1343 is substantially similar to § 1341 and states as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined or imprisoned ... or both.

18 U.S.C. § 1343.

Sections 1341 and 1343 are similar to § 1014 in several respects. Foremost, §§ 1341 and 1343 do not contain the word "material." Further, § 1341 was enacted as part of the recodification of the federal criminal code in 1948, and § 1343 was patterned after § 1341. Based on these factors considered in Wells, we conclude that materiality is not an element of fraud offenses in §§ 1341 and 1343.[4] As discussed below, we reach the same conclusion regarding § 1344.

C. Bank Fraud: 18 U.S.C. § 1344

In *United States v. Goldsmith*, 109 F.3d 714 (11th Cir.1997), this court lists materiality as an element under § 1344. *Id.* at 715. However, *Goldsmith* and the cases on which it relies do not directly address whether materiality is an element under § 1344.[5] For example, after listing materiality as an element under one part of § 1344, the *Goldsmith* panel did not mention the word "material" in the remainder of its opinion

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[4] In *United States v. Cochran*, 109 F.3d 660 (10th Cir.1997), the Tenth Circuit acknowledged that § 1343 supports two theories of liability: (1) a scheme or artifice to defraud; or (2) a scheme to obtain money by false pretenses, representations, or promises. *Id.* at 664. The court found that "materiality is not an independent element of a wire fraud prosecution," but held nonetheless that "there is a materiality aspect to the determination whether the acts of an accused give rise to a scheme to defraud." *Cochran*, 109 F.3d at 667 n. 3. We agree with the Tenth Circuit that materiality is not an independent element under § 1343. We find unpersuasive, however, the reasons supporting the Tenth Circuit's conclusion that materiality is an aspect of a scheme to defraud.

[5] See *United States v. Falcone*, 934 F.2d 1528, 1545 (11th Cir.), *vacated*, 939 F.2d 1455 (11th Cir.1991), *modified in part and reinstated in part*, 960 F.2d 988 (11th Cir.1992) (en banc); *United States v. Swearingen*, 858 F.2d 1555, 1556 (11th Cir.1988).

because materiality was not in issue. Although decided after *Wells*, *Goldsmith* does not re-examine the issue of materiality in light of *Wells*. Instead, *Goldsmith* follows this court's pre-Wells decisions which also have not been re-examined in light of Wells.

In addition, in its discussion of the relevant issues, the *Goldsmith* panel acknowledged that § 1344 has two parts, namely § 1344(a)(1) and (a)(2),[6] and that if an indictment charged a defendant under both parts, the trial court could submit the case to the jury so long as the evidence at trial was sufficient to convict under either part. 109 F.3d at 716. The Goldsmith panel listed the elements under subsections (a)(1) and (a)(2) but ultimately affirmed the defendant's conviction under § 1344(a)(1), the subsection under which it did not list materiality as an element.[7] Thus, the *Goldsmith* panel's listing materiality as an element under § 1344(a)(2) was not necessary to the panel's holding and was, consequently, dicta. As a result, we are not bound by *Goldsmith* on whether materiality is an element under § 1344, and we follow *Wells* in addressing this question.[8]

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[6] In 1989, § 1344 was amended such that the former subsection (a) became the entire section. Thus, what *Goldsmith* referred to as subsections 1344(a)(1) and (a)(2) are now subsections 1344(1) and (2).

[7] The defendant in *Goldsmith* was indicted under both subsections (a)(1) and (a)(2). Because the evidence supported the defendant's conviction under subsection (a)(1), the court did not reach whether the defendant violated subsection (a)(2). See *Goldsmith*, 109 F.3d at 716 ("Where the indictment and instructions to the jury charge both clauses of the statute, as was done in this case, the defendant's conviction may be sustained under either clause.) (citation omitted).

[8] To the extent any of our pre-*Wells* decisions held that materiality is an element under § 1344, we disavow those holdings based on the Supreme Court's intervening decision in *Wells*.

Applying *Wells* to § 1344, we first observe that the word "material" does not appear in the statute. The version of 18 U.S.C. § 1344 in effect when Neder was indicted states in pertinent part:

> (a) Whoever knowingly executes, or attempts to execute, a scheme or artifice—
> (1) to defraud a financial institution; or
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1344 (1988). Section 1344 was not enacted during the recodification of the federal criminal code in 1948, but its language, like § 1343, is substantially identical to and was patterned after § 1341. These factors, as we stated regarding §§ 1341 and 1343, persuade us that materiality is not an element under § 1344.

D. Use Of The Term "False Representation"

Before addressing Neder's tax fraud convictions, we do note that § 1014 criminalizes false statements, while §§ 1341, 1343, and 1344 proscribe "false or fraudulent pretenses, representations, or promises," and that on that basis the Ninth Circuit has held, after *Wells*, that materiality is an element under § 1344. See, *United States v. Nash*, 115 F.3d 1431, 1436 (9th Cir.1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1054, ___ L.Ed.2d ___ (1998). We disagree with the Ninth Circuit's analysis that since the term "representation" included "some notion of materiality at common law," this indicates that Congress intended for materiality to be an element of the bank fraud statute. See *id*. This ignores that Congress now has

employed the terms "material representation" and "material misrepresentation" in other statutes.[9] The fact that Congress uses the term "material" in conjunction with "representation" or "misrepresentation" in some statutes but not in others rebuts any presumption that Congress now intends to make materiality an element under a statute whenever it employs the term "representation" in that statute.

We are also unpersuaded by the Ninth Circuit's rationale that § 1344 targets fraud and, therefore, necessarily includes materiality as an element of bank fraud. This approach is inconsistent with Wells, which disfavors inferring a materiality requirement where the statutory language does not expressly include one. See *Wells*, ___ U.S. at ___, 117 S.Ct. at 927; *Nash*, 115 F.3d at 1436.

E. Tax Fraud: 26 U.S.C. § 7206(1)

Finally, we address whether materiality is an element under 26 U.S.C. § 7206(1). The relevant language of § 7206(1) refers to "every material matter," as follows:

> Any person who—
> (1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by written declaration that it is made under the penalties of perjury, and

[9] All of the following statutes use either the term "material representation" or "material misrepresentation": 8 U.S.C. § 1324c(f); 11 U.S.C. § 505(b); 12 U.S.C. § 1715r; 15 U.S.C. § 78u- 4(g)(10)(A)(i)(I); 15 U.S.C. § 158; 15 U.S.C. § 1647(b)(1); 25 U.S.C. § 88; 25 U.S.C. § 1494; 38 U.S.C. § 3721; 39 U.S.C. § 3005(d); 42 U.S.C. § 5919(f); 42 U.S.C. § 6881(d); 42 U.S.C. § 8817(f); 42 U.S.C. § 8835(g); 45 U.S.C. § 664(b); 45 U.S.C. § 720(d); 45 U.S.C. § 746(a); 45 U.S.C. § 832(b); 48 U.S.C. § 1574b(d).

> which he does not believe to be true and correct as to every *material* matter ... shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ... or imprisoned not more than 3 years, or both....

26 U.S.C. § 7206(1) (emphasis supplied). The government does not dispute that materiality is an element under § 7206(1) but contends that the materiality question is purely a question of law and appropriately was decided by the court.

Based on *Gaudin*, a majority of circuits addressing the question have held that the question of materiality under § 7206(1) is for the jury, not the judge. See *United States v. Uchimura*, 125 F.3d 1282, 1286 (9th Cir.1997); *United States v. McGuire*, 99 F.3d 671, 672 (5th Cir.1996) (en banc), *cert. denied*, ___ U.S. ___, 117 S.Ct. 2407, 138 L.Ed.2d 174 (1997); *United States v. DiRico*, 78 F.3d 732, 736 (1st Cir.1996); *United States v. DiDomenico*, 78 F.3d 294, 303 (7th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 507, 136 L.Ed.2d 398 (1996). But see *United States v. Klausner*, 80 F.3d 55, 60-61 (2d Cir.1996). We now join the First, Fifth, Seventh, and Ninth Circuits in holding that the question of materiality under § 7206(1) is for the jury. The district court thus erred in not submitting the element of materiality to the jury regarding Neder's § 7206(1) offenses.

F. The District Court's Gaudin Error Was Harmless

In this circuit, Gaudin errors do not require automatic reversal but are subject to harmless error analysis. *United States v. Fern*, 117 F.3d 1298, 1307 (11th Cir.1997).[10] Thus, the

[10] Accord *Bilzerian v. United States*, 127 F.3d 237, 242 (2d Cir.1997); *United States v. Knapp*, 120 F.3d 928, 932 (9th Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 417, 139 L.Ed.2d 319 (1997); *Waldemer v. United*

government must show that Neder was not prejudiced by the district court's *Gaudin* error. *Id.* (citing *United States v. Olano*, 507 U.S. 725, 734-35, 113 S.Ct. 1770, 1775-76, 123 L.Ed.2d 508 (1993)). The government has met that burden by showing that materiality was not in dispute regarding Neder's tax fraud offense.

Under § 7206(1), a "material matter" is any information necessary to a determination of a taxpayer's income tax liability. See *Uchimura*, 125 F.3d at 1285; *United States v. Aramony*, 88 F.3d 1369, 1384 (4th Cir.1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1842, 137 L.Ed.2d 1046 (1997); *Klausner*, 80 F.3d at 60; see also *United States v. Gaines*, 690 F.2d 849, 858 & n. 16 (11th Cir.1982) (stating that in a prosecution under § 7206(1), "the amounts of the misstatements were legally irrelevant...."); *United States v. Holland*, 880 F.2d 1091, 1096 (9th Cir.1989) (stating that "any failure to report income is material."). Neder's § 7206(1) convictions were based on his failing to report $1,372,360 in income in 1985 and $4,355,766 in income in 1986. An accurate reflection of income is critical to determining a taxpayer's income tax liability. Indeed, Neder did not contest the materiality of his failing to report this income either through testimony or evidence presented during the trial, or during closing argument. Neder did not even contest that he failed to report the money. Neder's defense on the § 7206(1) offenses related solely to his intent--specifically,

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States, 106 F.3d 729, 732 (7th Cir.1996); *United States v. Raether*, 82 F.3d 192, 194 (8th Cir.1996). But see *United States v. DeFries*, 129 F.3d 1293, 1311-12 & n. 13 (D.C.Cir.1997) (*Gaudin* error was, per se, a reversible error); *United States v. David*, 83 F.3d 638, 647 (4th Cir.1996) (*Gaudin* error requires automatic reversal); *United States v. DiRico*, 78 F.3d 732, 737-38 (1st Cir.1996) (*Gaudin* error constitutes a "structural error" requiring automatic reversal); *United States v. Pettigrew*, 77 F.3d 1500, 1511 (5th Cir.1996) (harmless error analysis does not apply to *Gaudin* error).

that he had relied on the advice of his attorney and accountant that he was not required to report the money as income.

Because materiality was not in dispute with respect to Neder's tax fraud offense, the district court's *Gaudin* error "did not contribute to the verdict obtained." *Yates v. Evatt*, 500 U.S. 391, 403, 111 S.Ct. 1884, 1892, 114 L.Ed.2d 432 (1991) (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967)). Therefore, the district court's error was harmless.

III. CONCLUSION

The district court committed no reversible errors, and Neder's convictions are thus

AFFIRMED.

United States District Court

Southern District of Florida

UNITED STATES OF AMERICA
v.
ELLIS E. NEDER, JR.

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)
Case Number:
91-175-Cr-J-16
Thomas G. Fallis, Esq.
(Defendant's Attorney)

THE DEFENDANT:

☐ pleaded guilty to count(s)
■ was found guilty on count(s) 1, 2-12, 21-23, 26-28, 30, 31-33, 34, 35, 36-72, 77, 78-84, 86, 87, 89, 90 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
8 U.S.C. 371	Conspiracy to defraud a financial institution.	May 1988	1
8 U.S.C. 1344	Bank fraud.	April 1986	2-12, 77
8 U.S.C. 1341	Mail fraud.	April 1986 Sept. 1987	21-23, 26-28, 30, 34, 35
8 U.S.C. 1343	Wire fraud.	Nov. 1986	31, 33, 78-84
8 U.S.C. 1014	False statements to financial institutions.	October 1985	36-72
8 U.S.C. 7206(1)	Filing false income tax returns.	Dec. 1987	86, 87

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
8 U.S.C. 1962(c) and 1962(d)	RICO.	May 1988	89, 90

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

■ The defendant has been found not guilty on count(s) 13 through 20, and is discharged as to such count(s).

☐ Count(s) _____ (is) (are) dismissed on the motion of the United States.

■ It is ordered that the defendant shall pay a special assessment of $3,650.00, for count(s) 1, 2-12, 21-23, 26-28, 30, 31-33, 34, 35, 36-72, 77, 78-84, 86, 87,89, 90, which shall be due ■ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 262-75-4595

Defendant's Date of Birth: September 15, 1942

Defendant's Mailing Address:
c/o U.S. Marshal

Defendant's Residence Address:
c/o U.S. Marshal

June 2, 1994
Date of Imposition of Sentence

/s/
Signature of Judicial Officer

HARVEY E. SCHLESINGER,
U.S. District Judge
Name & Title of Judicial Officer

September 15,1992
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FIVE (5) YEARS on each of Counts 1, 77, 80, 81, 82, 83 and 84, each count to run concurrently with each other.

IT IS FURTHER ADJUDGED that the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THREE (3) YEARS on each of Counts 86 and 87, each count to run concurrently with each other and with the sentence imposed on Counts 1, 77, 80, 81, 82, 83 and 84.

IT IS FURTHER ADJUDGED that the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of SEVEN (7) YEARS on each of Counts 89 and 90, each count to run concurrently with each other and with the sentences imposed on Counts 1, 77, 80, 81, 82, 83, 84, 86 and 87.

IT IS FURTHER ADJUDGED that the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FIVE (5) YEARS on each of Counts 2 through 12, 21 through 23, 26 through 28, 30 through 72, 78 and 79, each count to run concurrently with each other and consecutive to the sentences imposed on Counts 1, 77, 80, 81, 82,83, 84, 86 and 87, for a TOTAL TERM OF IMPRISONMENT OF TWELVE (12) YEARS AND THREE (3) MONTHS.

■ The court makes the following recommendations to the Bureau of Prisons: Federal Institution, Jesup, Georgia.

■ The defendant is remanded to the custody of the United States marshal.

☐ The defendant shall surrender to the United States marshal for the district,

a.m.

☐ at _____ p.m. on

☐ as notified by the United States marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

☐ before 2 p.m. on

☐ as notified by the United States marshal.

☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

Defendant delivered on 10/13/92 to FCI - SEA GOUILLE at , with a certified copy of this judgment.

United States Marshal

By

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE YEARS on each of Counts 1, 77, 80 through 84, 86, 87, 89 and 90.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

- ■ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
- □ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.
- ■ Defendant shall participate in the Home Detention program for a period of ___ days. During this time, defendant will remain at defendant's place of residence except for employment and other activities approved in advance by defendant's Probation Officer. Defendant will be subject to the standard conditions of Home Detention adopted for use in the Middle District of Florida, which may include the requirement to wear an electronic monitoring device and to follow electronic monitoring procedures specified by the Probation Officer.

Defendant shall pay the unpaid balance of restitution (see page 4 of this Judgment) upon release from imprisonment.

Defendant is prohibited from incurring new credit charges, opening new lines of credit, or obligating for major purchases without approval of the probation office unless in compliance with payment schedule.

Defendant shall provide probation office iwth requested financial information.

Defendant is prohibited from engaging in employment related to real estate development.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in resident or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION AND FORFEITURE

■ The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
Carteret S & L	$402,577.00
Amerifirst Federal S & L (now Resolution Trust Corp. (RTC))	$2,300,000.00
Greyound Leasing & Financial Corp.	$1,300,000.00
Baltimore Federal Saving (now RTC)	$1,778,419.00
Security First Federal S & L (now RTC)	$3,100,000.00
United Brotherhoiod of Carpenters & Joiners of America	$10,265,00.00
Cari Bank	$5,900,000.00

TOTAL RESTITUTION: $25,045,996.00

Payments of restitution are to be made to:

■ the United States Attorney for transfer to the payee(s).

☐ the payee(s).

Restitution shall be paid:

■ in full immediately.

☐ in full not later than _____.

☐ in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

☐ in installments according to the following schedule of payments:

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

☐ The defendant is ordered to forfeit the following property to the United States:

STATEMENT OF REASONS

■ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level:
Criminal History Category:
Imprisonment Range: __ to __ months
Supervised Release Range: __ to __ years
Fine Range: $ to $

■ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $25,045,996.00

☐ Full restitution is not ordered of rthe following reason(s):*

■ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):*

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):*

Excerpts of Jury Instructions

In summary, Count One charges that the Defendants knowingly and willfully conspired together in violation of Title 18, United States Code, Section 371, to execute and attempt to execute a scheme and artifice to defraud and to obtain the moneys owned by and under the custody and control of federally insured financial institutions, by means of false and fraudulent pretenses, representations, and promises, in violation of Title 18, United States Code, Section 1344; and to knowingly make any false statement or report, or willfully overvalue any land, property or security for the purpose of influencing in any way the action of the institutions the accounts of which are insured by the FSLIC upon applications and loans, or any change or extension of any of the same, in violation of Title 18, United States Code, Section 1014; and to knowingly and willfully transmit by means of wire communications in interstate commerce writings, signals, pictures, and sounds for the purpose of executing a scheme and artifice to defraud, and to obtain moneys by false pretenses, representations, and promises, in violation of Title 18, United States Code, Section 1343.

Count Ninety charges that the Defendants unlawfully and willfully entered into a separate conspiracy in violation of Title 18, United States Code, Section 1962(d), to conduct and participate, directly or indirectly, in the conduct of the affairs of an enterprise through a pattern of racketeering activity consisting of mail fraud and wire fraud, in violation of Title 18, United States Code, Section 1962(c).

The remaining Counts charge the commission of the substantive offenses; namely that the Defendants committed bank fraud in Counts Two through Twelve, and Seventy-seven, in violation of Title 18, United States Code, Section 1344; land over-evaluations in Counts Thirteen through Twenty, and false

statements to financial institutions in Counts Thirty-six through Seventy-two, all in violation of Title 18, United States Code, Section 1014; mail fraud in Counts Twenty-one through Twenty-three, Twenty-six through Twenty-eight, Thirty, Thirty-four, and Thirty-five, all in violation of Title 18, United States Code, Section 1341; wire fraud in Counts Thirty-one through Thirty three, and Seventy-eight through Eighty-four, all in violation of Title 18, United States Code, Section 1343; false statements on income tax returns in Counts Eighty-six and Eighty-seven, all in violation of Title 26, United States Code, Section 7206(1); and racketeering in Count Eighty-nine, in violation of Title 18, United States Code, Section 1962(c).

You will note that as to Counts One and Ninety, the Defendants are not charged in those counts with violating the substantive counts I have named; rather they are charged with having conspired to do so in violation of Title 18, United States Code, Sections 371 and 1962(d).

I will explain the law governing those substantive offenses in a moment.

Title 18, United States Code, Section 371, makes it a separate federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would amount to another Federal crime or offense. So, under this law, a "conspiracy" is an agreement or a kind of "partnership" in criminal purposes in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense in Count One, it is not necessary for the Government to prove that all of the people named in the indictment were members of the scheme; or that those who were members had entered into any formal type of agreement; or that the members had planned together all of the details of the scheme or the "overt acts that the

indictment charges would be carried out in an effort to commit the intended crime.

Also, because the essence of a conspiracy offense is the making of the agreement itself (followed by the commission of any overt act), it is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

A Defendant can be found guilty of that offense as charged in Count One only if all of the following elements are proved beyond a reasonable doubt:

First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;

Second: That the Defendant willfully became a member of such conspiracy;

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the methods (or "overt acts") described in the indictment; and

Fourth: That such "overt act" was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

An "overt act" is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

A person may become a member of a conspiracy without knowing all of the details of the unlawful scheme, and without knowing who all of the other members are. So, if a Defendant

has an understanding of the unlawful nature of a plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict him for conspiracy even though he did not participate before, and even though he played only a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of one, does not thereby become a conspirator.

In this instance, with regard to the alleged conspiracy in Count One, the Indictment charges that the Defendants conspired with each other and other persons to commit bank fraud or wire fraud, or to make false statements to federally insured financial institutions. It is charged, in other words, that they conspired to commit three separate, substantive crimes or offenses.

In such a case it is not necessary for the Government to prove that the Defendant under consideration willfully conspired to commit all of the substantive offenses. It would be sufficient if the Government proves, beyond a reasonable doubt, that the Defendants willfully conspired with someone to commit one of those offenses; but, in that event, in order to return a verdict of guilty, you must unanimously agree upon which of the three offenses the Defendants conspired to commit. If you cannot agree in that manner, you must find the Defendant not guilty.

Title 18, United States Code, Section 1344, makes it a federal crime or offense for anyone to execute or attempt to execute a scheme to obtain money of a federally insured financial institution.

A Defendant can be found guilty of that offense as charged in Counts Two through Twelve, and Seventy-seven only if all of the following elements are proved beyond a reasonable doubt:

First: That the Defendant knowingly and willfully devised a scheme for obtaining, by means of false or fraudulent pretenses, representations or promises, moneys or funds owned by or under the custody or control of a federally insured financial institution;

Second: That the Defendant participated directly in, or aided and abetted, the making of false pretenses, representations, or promises which were material to the federally insured institution; and

Third: That the Defendant executed, or aided and abetted the execution of the scheme by preparing and submitting and causing to be prepared and submitted to the insured financial institution certain documents.

A federal insured financial institution means any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, or any savings and loan associations, whose deposits are insured by the Federal Savings and Loan Insurance Corporation.

The word "scheme" includes any plan or course of action intended to deceive others, and to obtain, by false or fraudulent pretenses, representations or promises, money or property from persons so deceived.

A statement or representation is "false" or "fraudulent" if it relates to a material fact and is known to be untrue or is made with reckless indifference as to its truth or falsity, and is made or caused to be made with intent to defraud. A statement

or representation may also be "false" or "fraudulent" when it constitutes a half truth with intent to defraud, or effectively conceals a material fact with intent to defraud. A "material fact" is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in an particular transaction.

If you find that the Government has proved these three elements stated above beyond a reasonable doubt, you need not consider whether the false and fraudulent pretense, representation, or promise was a material false and fraudulent pretense, representation or promise, even though that language is used in the Indictment. This is not a question for the jury to decide.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive someone, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

Good faith is a complete defense to those charges that require intent to defraud in the indictment since good faith on the part of the Defendant is inconsistent with intent to defraud or willfulness which is an essential part of the charges. The burden of proof is not on the Defendant to prove his good faith, of course, since he has no burden to prove anything. The Government must establish beyond a reasonable doubt that the Defendant acted with specific intent to defraud where it is charged in the indictment.

One who expresses an opinion honestly held by him, or a belief honestly entertained by him, is not chargeable with fraudulent intent even though his opinion is erroneous or his belief is mistaken; and similarly, evidence which establishes only that a person made a mistake in judgment or an error in management, or was careless, does not establish fraudulent intent.

On the other hand, an honest belief on the part of the Defendant that a particular business venture was sound and would ultimately succeed would not, in and of itself, constitute "good faith" as used in these instructions if, in carrying out that venture, the Defendant knowingly made false or fraudulent representations to others with the specific intent to deceive them.

It is not necessary that the Government prove all of the details alleged in the Indictment concerning the precise nature and purpose of the scheme; or that the alleged scheme actually succeeded in defrauding anyone.

What must be proved beyond a reasonable doubt is that the Defendant knowingly and willfully devised or intended to devise a scheme to defraud substantially the same as the one alleged in the Indictment; and that the act in execution of a scheme was performed as charged.

Each separate act of execution in furtherance of a scheme to defraud constitutes a separate offense.

Title 18, United States Code, Section 1014, makes it a federal crime or offense for anyone to willfully overvalue any land to a federally insured bank or savings and loan association.

A Defendant can be found guilty of that offense charged in Counts Thirteen through Twenty only if all of the following elements are proved beyond a reasonable doubt:

First: That the Defendant knowingly overvalued any land, and such overvaluation was a material fact to an insured savings and loan association or insured bank, as charged; and

Second: That the Defendant overvalued the land willfully and with intent to influence the action of the savings and loan association or insured bank

upon an application, advance, commitment or loan, or any change or extension thereof.

An "insured bank" means any bank the deposits of which are insured by the Federal Deposit Insurance Corporation. An "insured savings and loan association" means any such institution whose deposits are insured by the Federal Savings and Loan Insurance Association.

The terms "false" and "material" have already been defined for you.

It is not necessary, however, to prove that the institution involved was, in fact, influenced or misled. The gist of the offense is an attempt to influence such an institution willfully overvaluing land.

If you find that the Government has proved these two elements stated above beyond a reasonable doubt, you need not consider whether the false and fraudulent pretense, representation, or promise was a material false and fraudulent pretense, representation or promise, even though that language is used in the indictment. This is not a question for the jury to decide.

Title 18, United States Code, Section 1014, makes it a federal crime or offense for anyone to willfully make a false statement to a federally insured bank or savings and loan association.

A Defendant can be found guilty of that offense charged in Counts Thirty-Six through Seventy-two only if all of the following elements are proved beyond a reasonable doubt:

First: That the Defendant knowingly made a false statement or report concerning a material fact to an insured savings and loan association or insured bank, as charged; and

Second: That the Defendant made the false statement or report willfully and with intent to influence the action of the savings and loan association or insured bank upon an application, advance, commitment or loan, or any change or extension thereof.

The terms "insured bank," "false," and "material" have already been defined for you.

Again, it is not necessary to prove that the institution involved was, in fact, influenced or misled. The gist of the offense is an attempt to influence such an institution by willfully making a false statement or report concerning the matter.

If you find that the Government has proved these two elements stated above beyond a reasonable doubt, you need not consider whether the false and fraudulent pretense, representation, or promise was a material false and fraudulent pretense, representation or promise, even though that language is used in the indictment. This is not a question for the jury to decide.

Title 18, United States Code, Section 1341, makes it a federal crime or offense for anyone to use the United States mails in carrying out a scheme to defraud.

A Defendant can be found guilty of that offense charged in Counts Twenty-one through Twenty-three, Twenty-six through Twenty-eight, Thirty, Thirty-four and Thirty-five only if all of the following elements are proved beyond a reasonable doubt:

First: That the Defendant knowingly and willfully devised a scheme to defraud, or for obtaining money or property by means of false pretenses, representations or promises; and

Second: That the Defendant used the United States Postal Service by mailing, or by causing to be mailed, or takes or receives therefrom, some matter or thing for the purpose of executing the scheme to defraud.

The terms "scheme," "false," "material," and "intent to defraud" have already been defined for you.

It is not necessary that the Government prove all of the details alleged in the Indictment concerning the precise nature and purpose of the scheme; or that the material mailed was itself false or fraudulent; or that the alleged scheme actually succeeded in defrauding anyone; or that the use of the mail was intended as the specific or exclusive means of accomplishing the alleged fraud.

What must be proved beyond a reasonable doubt is that the Defendant knowingly and willfully devised or intended to devise a scheme to defraud substantially the same as the one alleged in the Indictment; and that the use of the U.S. mail was closely related to the scheme because the Defendants either mailed something, or caused it to be mailed, or took or received a matter or thing in an attempt to execute or carry out the scheme. To "cause" the mails to be used is to do an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use can reasonably be foreseen.

Each separate use of the mails in furtherance of a scheme to defraud constitutes a separate offense.

Title 18, United States Code, Section 1343, makes it a federal crime or offense for anyone to use interstate wire communications facilities in carrying out a scheme to defraud.

A Defendant can be found guilty of that offense charged in Counts Thirty-one through Thirty-three and Seventy-eight

through Eighty-four only if all of the following elements are proved beyond a reasonable doubt:

First: That the Defendant knowingly and willfully devised a scheme to defraud, or for obtaining money or property by means of false pretenses, representations or promises; and

Second: That the Defendant knowingly transmitted or caused to be transmitted by wire in interstate commerce some sound for the purpose of executing the scheme to defraud.

The words "scheme," "false," and "intent to defraud" have been previously defined for you.

It is not necessary that the Government prove all of the details alleged in the Indictment concerning the precise nature and purpose of the scheme; or that the material transmitted by wire was itself false or fraudulent; or that the alleged scheme actually succeeded in defrauding anyone; or that the use of the interstate wire communication facilities was intended as the specific or exclusive means of accomplishing the alleged fraud.

What must be proved beyond a reasonable doubt is that the Defendant knowingly and willfully devised or intended to devise a scheme to defraud substantially the same as the one alleged in the Indictment; and that the use of the interstate wire communications facilities was closely related to the scheme because the Defendant either wired something, or caused it to be wired in interstate commerce in an attempt to execute or carry out the scheme. To "cause" interstate wire communication facilities to be used to do an act with knowledge that the use of the wires will follow in the ordinary course of business or where such use can reasonably be foreseen.

Each separate use of the interstate wire communications facilities in furtherance of a scheme to defraud constitutes a separate offense.

Title 26, United States Code, Section 7206(1), makes it a crime for anyone willfully to make a false statement on an income tax return. "Willfully" means with intent to violate a known legal duty.

The Defendant Neder can be found guilty of that offense as charged in Counts Eighty-six and Eighty-seven, only if all of the following elements are proved beyond a reasonable doubt:

First: That the Defendant signed an income tax return that contained a written declaration that it was made under penalties of perjury:

Second: That in this return the Defendant falsely reported a total income in his 1985 return of $53,625 and in his 1986 return a minus $980,377;

Third: That the Defendant knew the statement was false; and

Fourth: That the Defendant made the statement on purpose, and not as a result of accident, negligence or inadvertence.

If you find that the Government has proved these things, you need not consider whether the false statement was a material false statement, even though that language is used in the indictment. This is not a question for the jury to decide.

Count Eighty-nine of the Indictment charges that from in or about May 1984 to in or about May 1988, the Defendants were persons associated with an "enterprise" engaged in, or the activities of which affected, interstate commerce, and that they knowingly and willfully participated in the conduct of the enterprise's affairs "through a pattern of racketeering activity,"

in violation of Title 18, United States Code, Section 1961 and 1962(c).

The term "enterprise" includes any "partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Individuals and corporations are a "group of individuals associated in fact."

The term "racketeering activity" includes any act in violation of Title 18 of the Untied [*sic*] States Code relating to mail fraud (Section 1341) and wire fraud (Section 1343).

The term "pattern of racketeering activity" requires at least two acts of "racketeering activity," sometimes called "predicate offenses," which must have been committed within ten years of each other, one of which must have occurred after October 15, 1970.

A Defendant can be guilty of that offense as charged in Count Eighty-nine only if all of the following elements are proved beyond a reasonable doubt:

First: That the Defendant was associated with an "enterprise" as defined in these instructions;

Second: That the Defendant knowingly and willfully committed, or knowingly and willfully aided and abetted the commission of at least two of the predicate offenses hereinafter specified;

Third: That the two predicate offenses alleged committed by the Defendant were connected with each other by some common scheme, plan or motive so as to be a pattern or a criminal activity and not merely a series of separate, isolated or disconnected acts;

Fourth: That through the commission of the two or more connected offenses, the Defendant conducted or participated in the conduct of the "enterprises's" affairs; and

Fifth: That the "enterprise" was engaged in, or that its activities affected, interstate commerce.

With respect to the Second specific element defined above, the Government must prove beyond a reasonable doubt that the Defendant under consideration knowingly and willfully committed, or aided and abetted the commission of, any two of the predicate offenses specifically alleged and described in the Indictment as Counts Twenty-one through Twenty-three, Thirty-one, Twenty-six through Twenty-eight, Thirty, Thirty-two through Thirty-five and Seventy-eight through Eighty-Four, and alleged as racketeering acts 1 through 3, 4(b), 6 though [*sic*] 8, and 10 through 15(g). You are further instructed, however, that you must unanimously agree concerning each Defendant under consideration as to which of the two predicate offenses he is alleged to have committed, or aided and abetted in committing. It would not be sufficient if some of the jurors should find that a Defendant committed two of the predicate offenses while the remaining jurors found that he committed two different offenses; you must all agree upon the same two predicate offenses in order to find a Defendant guilty of Count Eighty-nine.

With respect to the Fifth specific element defined above—the requirement that the "enterprise" was engaged in, or that its activities affected, interstate commerce—the Government contends that in conducting the affairs of the enterprise the Defendants would: obtain loan proceeds from lenders by interstate and intrastate wire transmissions; mail documents out of the State of Florida for signature and cause them to be returned to the State of Florida as part of various loan and real estate transactions; send correspondence and

documents from Jacksonville in the State of Florida to locations outside the State of Florida in support of their attempts to obtain land acquisition and land development loans. The Government contends that documents in support of various loan requests were sent from the State of Florida to the States of Arizona, New York, and to Washington, D.C., causing the transmission of funds by wire in interstate commerce. You are instructed that if you find beyond a reasonable doubt that these transactions or events occurred, and that they occurred in, or as a direct result of, the conduct of the affairs of the alleged enterprise, the required effect upon interstate commerce has been established. If you do not so find, the required effect upon interstate commerce has not been accomplished.

Title 18, United States Code, Section 1962(c), makes it a federal crime or offense for anyone who is associated with an "enterprise" engaged in, or activities of which affect, interstate commerce, to participate in conducting the affairs of the enterprise through a "pattern of racketeering activity."

The meaning of those terms, and an explanation of what must be proved in order to establish that offense, is discussed in that part of these instructions covering Count Eighty-nine of the Indictment.

However, the Defendants named in Count Ninety of the Indictment—the conspiracy count—are not charged in that count with violating Section 1962(c); rather, they are charged with knowingly and willfully conspiring to violate that law, the alleged conspiracy itself being a separate crime or offense in violation of Section 1962(d).

So, under that law a "conspiracy" is a combination or agreement of two or more persons to join together to attempt to accomplish an offense which would be in violation of Section 1962(c) as elsewhere defined in these instructions. It is a kind

of "partnership in criminal purposes" in which each member becomes the agent of every other member.

The evidence in the case need not show that the alleged members of the conspiracy, in Count Ninety, entered into any express or formal agreement; or that they directly discussed between themselves the details of the scheme and its purpose, or the precise ways in which the purpose was to be accomplished. Neither must it be proved that all of the persons charged to have been members of the conspiracy were such, nor that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

A Defendant can be found guilty of that offense as charged in Count Ninety only if all of the following elements are proved beyond a reasonable doubt:

First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, namely, to engage in a "pattern of racketeering activity" as charged in the indictment; and

Second: That the Defendant knowingly and willfully became a member of such conspiracy; and

Third: That at the time the Defendant knowingly and willfully agreed to join in such conspiracy, he did so with the specific intent either to personally participate in the commission of two "predicate offenses," as elsewhere defined in these instructions, or that he specifically intended to otherwise participate in the affairs of the "enterprise" with the knowledge and intent that other members of the conspiracy would commit two or more "predicate offenses" as a part of a "pattern of racketeering activity."

A person may become a member of this conspiracy without full knowledge of all of the details of the unlawful scheme or the names and identities of all of the other alleged conspirators. So, if a Defendant has an understanding of the unlawful nature of a plan and knowingly and willfully joining that plan on one occasion, that is sufficient to convict him for conspiracy even though he did not participate before, and even though he played only a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other, and have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of a conspiracy, does not thereby become a conspirator.

The guilt of a Defendant in a criminal case may be proved without evidence that he personally did every act involved in the commission of the crime charged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished through direction of another person as an agent, or by acting together with, or under the direction of, another person or persons in a joint effort.

So, if the acts or conduct of an agent, employee or other associate of the Defendant are willfully directed or authorized by the Defendant, or if the Defendant aids and abets another person by willfully joining together with that person in the commission of a crime, then the law holds the Defendant responsible for the conduct of that other person just as though the Defendant had engaged in such conduct himself.

Notice, however, that before any Defendant can be held criminally responsible for the conduct of others it is necessary that the Defendant willfully associate himself in some way with

the crime, and willfully participate in it. Mere presence at the scene of a crime and even knowledge that a crime is being committed are not sufficient to establish that a Defendant either directed or aided and abetted the crime. You must find beyond a reasonable doubt that the Defendant was a willful participant and not merely a knowing spectator.

One of the Defendants is a corporation. A corporation is a legal entity, and it may be found guilty of a criminal offense.

A corporation, of course, cannot act for itself. It may only act through its agents. Agents are the officers, directors, employees, or other persons who may be authorized to act for the corporation. A corporation is legally responsible for those acts or omissions of its agents made or performed within the scope of their employment.

To find a corporate defendant guilty, you must find beyond a reasonable doubt that all the essential elements of the offense, as set forth in these instructions, are present as to the corporation in the form of acts or omissions of its agent which were performed with the scope of their employment. Whether the agents' acts or omissions were committed within the scope of their employment is a question of fact.

To be acting within his employment, the agent first must have intended that his act would produce some benefit to the corporation. Second, the agent must have been acting within his authority. An act was within the agent's authority if it was directly related to the performance of the type of duties that the employee had the general authority to perform or if outsiders could reasonably assume that the agent had the authority to perform the act, judging from his position with the company, the responsibility previously entrusted to him, and the circumstances surrounding his past conduct.

If the agent was acting within the scope of his employment, the fact that the agent's act was illegal, contrary to his employer's instructions, or against the corporation's policies will not relieve the corporation of responsibility for it.

If you find that an act of an agent was not committed within the scope of his employment, then you must consider whether the corporation later approved the act. An act is approved if, after it is performed, another agent of the corporation, with the authority to perform or authorize the act, and with the intent to benefit the corporation, either expressly approves or engages in conduct that is consistent with approving the act.

A corporation is legally responsible for any act or omission approved by its agents.

In these charges, the Court has reviewed the pertinent parts of federal statutes which are alleged to have been violated. Where a statute specifies several alternative ways in which an offense may be committed, the Indictment may allege the several ways in the conjunctive, that is, by using the word "and;" therefore, if only one of the alternatives is proved beyond a reasonable doubt, that is sufficient for conviction, so long as the jury agrees unanimously as to at least one of the alternatives.

You will note that the Indictment charges that the offenses were committed "on or about" a certain date. The Government does not have to prove with certainty the exact date of the alleged offenses. It is sufficient if the Government proves beyond a reasonable doubt that the offenses were committed on a date reasonably near the date alleged.

The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

The word "willfully," as that term has been used from time to time in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is with bad purpose either to disobey or disregard the law.

18 U.S.C. § 1341

18 U.S.C. § 1341, as currently in effect, provides as follows:

"§ 1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

18 U.S.C. § 1343

18 U.S.C. § 1343, as currently in effect, provides as follows:

"§ 1343. Fraud by wire, radio, or television.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

18 U.S.C. § 1344

18 U.S.C. § 1344, as currently in effect, provides as follows:

"§ 1344. Bank fraud.

Whoever knowingly executes, or attempts to execute, a scheme or artifice--

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

26 U.S.C. § 7206

26 U.S.C. § 7206, as currently in effect, provides as follows:

"**§ 7206. Fraud and false statements**.

Any person who--

(1) Declaration under penalties of perjury. -- Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance. -- Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries. -- Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud. -- Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) Compromises and closing agreements. -- In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully--

(A) Concealment of property. -- Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records. -- Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

FILED
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SUPREME COURT, U.S.

No. 97-1985

In the Supreme Court of the United States

OCTOBER TERM, 1997

ELLIS E. NEDER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether materiality is an element of mail fraud (18 U.S.C. 1341), wire fraud (18 U.S.C. 1343), and bank fraud (18 U.S.C. 1344).

2. Whether the trial court's failure to instruct the jury on the materiality element of the tax charges in this case was harmless error because materiality was not in dispute at trial.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Discussion	6
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Bilzerian v. *United States*, 127 F.3d 237 (2d Cir. 1997), petition for cert. pending, No. 97-1892	12, 13
BMW of N. Am., Inc. v. *Gore*, 517 U.S. 559 (1996)	7
California v. *Roy*, 519 U.S. 2 (1996)	11
Durland v. *United States*, 161 U.S. 306 (1896)	7
Gideon v. *Wainwright*, 372 U.S. 335 (1963)	10-11
Hart v. *Stagner*, 935 F.2d 1007 (9th Cir. 1991)	12
Johnson v. *United States*, 117 S. Ct. 1544 (1997)	11
McKaskle v. *Wiggins*, 465 U.S. 168 (1984)	10
Rogers v. *United States*, 118 S. Ct. 673 (1998)	12
Rose v. *Clark*, 478 U.S. 570 (1986)	10
Sullivan v. *Louisiana*, 508 U.S. 275 (1993)	10, 11
Tumey v. *Ohio*, 273 U.S. 510 (1927)	11
United States v. *Cochran*, 109 F.3d 660 (10th Cir. 1997)	8
United States v. *Coffman*, 94 F.3d 330 (7th Cir. 1996), cert. denied, 117 S. Ct. 1425 (1997)	7
United States v. *DeFries*, 129 F.3d 1293 (D.C. Cir. 1997)	13
United States v. *DeSantis*, 134 F.3d 760 (6th Cir. 1998)	8-9
United States v. *DiRico*, 78 F.3d 732 (1st Cir. 1996)	12, 13

Cases—Continued: Page

United States v. *Fern*, 117 F.3d 1298 (11th Cir. 1997) 12
United States v. *Gaudin*, 515 U.S. 506 (1995) 8, 9
United States v. *Holland*, 880 F.2d 1091 (9th Cir. 1989) 12
United States v. *Johnson*, 71 F.3d 139 (4th Cir. 1995) 13
United States v. *Klausner*, 80 F.3d 55 (2d Cir. 1996) 9
United States v. *Moser*, 123 F.3d 813 (5th Cir.), cert. denied, 118 S. Ct. 613 (1997) 9
United States v. *Nash*, 115 F.3d 1431 (9th Cir. 1997), cert. denied, 118 S. Ct. 1054 (1998) 9
United States v. *Pribble*, 127 F.3d 583 (7th Cir. 1997), cert. denied, 118 S. Ct. 1056 (1998) 9
United States v. *Raether*, 82 F.3d 192 (8th Cir. 1996) 12, 13
United States v. *Rodriguez*, 140 F.3d 163 (2d Cir. 1998) 8
United States v. *Slaughter*, 128 F.3d 623 (8th Cir. 1997) 8
United States v. *Wells*, 519 U.S. 482 (1997) 5, 7, 8
Vasquez v. *Hillery*, 474 U.S. 254 (1986) 10
Waldemar v. *United States*, 106 F.3d 729 (7th Cir. 1996) 13
Waller v. *Georgia*, 467 U.S. 39 (1984) 10
Yates v. *Evatt*, 500 U.S. 391 (1991) 6

Statutes:

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.* 9
18 U.S.C. 1962(c) 1
18 U.S.C. 1962(d) 2

Statutes—Continued: Page

18 U.S.C. 371 2
18 U.S.C. 1014 ..... 2, 5
18 U.S.C. 1341 ..... 2, 5, 6, 7, 8, 9, 10
18 U.S.C. 1343 ..... 2, 5, 6, 7, 8, 10
18 U.S.C. 1344 ..... 2, 6, 7, 8, 9, 10
26 U.S.C. 7206 ..... 11, 12
26 U.S.C. 7206(1) 2, 6, 9, 10, 12

Miscellaneous:

1 J. Story, *Commentaries on Equity Jurisprudence* (13th ed. 1886) 7
Restatement (Second) of Torts (1977) 7

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 136 F.3d 1459.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1998. The petition for a writ of certiorari was filed on June 9, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conducting the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. 1962(c)); one count of conspiring to commit

that offense (18 U.S.C. 1962(d)); one count of conspiring to defraud a financial institution (18 U.S.C. 371); 12 counts of bank fraud (18 U.S.C. 1344); nine counts of mail fraud (18 U.S.C. 1341); nine counts of wire fraud (18 U.S.C. 1343); 37 counts of making false statements to a financial institution (18 U.S.C. 1014); and two counts of filing false income tax returns (26 U.S.C. 7206(1)). He was sentenced to 147 months' imprisonment, to be followed by five years' supervised release, and was ordered to pay approximately $25 million in restitution. Pet. App. 14a-20a. The court of appeals affirmed. *Id.* at 1a-13a.

1. Between August 1984 and November 1986, petitioner purchased land using shell corporations. Petitioner then resold the land at much higher prices to limited partnerships that he controlled. Petitioner used bank loans to finance the resales. Because the loans typically amounted to 70% of the inflated price, the loan proceeds substantially exceeded the original cost of the land to petitioner's shell corporations. Petitioner made numerous false statements in order to conceal from lenders that he controlled the shell corporations that had first bought the land and that he had engaged in a scheme to inflate the apparent value of the land. The lenders would not have made the loans in question had petitioner not made false statements to conceal his scheme. Gov't C.A. Br. 3-7.

After each transaction, petitioner deposited to his personal account a check reflecting the amount by which the loan proceeds exceeded the original purchase price of the land. In that way, petitioner obtained more than $7 million. Petitioner made only $75,000 in payments before defaulting on all of the loans, which totaled approximately $17 million. Gov't C.A. Br. 7-8.

Petitioner also obtained a $4,150,000 construction loan to build condominiums on a project known as Cedar Creek. The bank loan officer told petitioner that, in order to qualify for the loan, he would have to make advance sales of 20 units. Petitioner initially was able to sell only 13 units, so he secured an additional seven buyers by making their down payments in amounts ranging from $4,000 to $8,900. Petitioner thereby obtained the construction loan, but he subsequently defaulted without repaying any of the principal. Petitioner also arranged to have the down payments transferred back to him from the escrow account into which they had been placed. The lender would not have made the loan had it been aware that petitioner rather than the buyers had made the down payments on seven of the sales. Gov't C.A. Br. 9-11.

Petitioner used a similar scheme to obtain a $5,400,000 loan for development of condominiums at another project referred to as the Southern Grove project. The bank loan officer required that petitioner have 25 reservation agreements signed by prospective buyers, and that the prospective buyers each pay a $500 deposit to establish their genuine interest in the project. Petitioner solicited people to sign reservation agreements, offering to pay the $500 deposit fee in return for their signatures. Between July and October 1985, petitioner obtained 19 signed reservation agreements. Petitioner signed each of those agreements as the seller, but he also made each of the deposit payments for the supposed buyers and forged the signatures of two of the supposed buyers. In October 1985, petitioner obtained the construction loan. The lender would not have made the loan had it been aware that petitioner had paid the deposits for the supposed buyers. Gov't C.A. Br. 11-13.

After he obtained the loan for the first phase of the Southern Grove project, petitioner sought an additional loan for the next phase. The loan officer told petitioner that the bank would not issue a construction loan for a given building unless petitioner made advance sales of 70% of the units in the building. The loan officer also said that the buyers had to make nonrefundable deposits of 10% of the purchase price, and that the buyers had to qualify for a mortgage loan from the bank. Petitioner subsequently obtained ten signed reservation agreements, but he himself provided the funds that the buyers used to make the required deposits of approximately $8,000. In making its loan decision, the lender relied on the misrepresentations in the reservation agreements that the buyers were the source of the deposits. Gov't C.A. Br. 13-14.

Petitioner attempted to obtain a $4,700,000 loan relating to a project called The View. As part of that attempt, petitioner directed a lawyer to execute a false deed and promissory note. Although the lender approved the loan application, and petitioner and the lender signed a commitment letter, the transaction fell through when petitioner's lawyer refused to sign an opinion letter representing that petitioner's financial status had not changed for the worse. Gov't C.A. Br. 15-17.

In November 1986, petitioner obtained a $6 million land acquisition loan for a project known as the Reddie Point project. He fell behind in his payments, but in July 1987 he negotiated a consolidated $14 million loan to cover land acquisition and construction costs. Under the terms of the revised loan, petitioner could submit draw requests for work actually performed on the project. Instead, he submitted false draw requests and obtained approximately $3 million, which he used to

make interest payments on his other loans. Gov't C.A. Br. 18-20.

Finally, petitioner failed to report on his personal income tax return more than $1 million in income for 1985 and more than $4 million in income for 1986. Those amounts represented the profits from petitioner's land acquisition scheme, which petitioner had deposited into his personal account and used for his own purposes. Gov't C.A. Br. 20-22.

2. At trial, the district court instructed the jury on the bank fraud, false statement, and tax offenses that the question of materiality was not for the jury to decide. Pet. App. 28a, 30a, 31a, 34a. On the wire and mail fraud offenses, the district court did not include materiality as an element. *Id.* at 31a-34a. Petitioner objected to the district court's refusal to require that the jury make findings of materiality on all of the offenses at issue. *Id.* at 3a; Gov't Supp. C.A. Br. 1. The district court subsequently made a finding, outside of the presence of the jury, that the evidence established materiality beyond a reasonable doubt on all counts at issue. Pet. App. 3a; Gov't Supp. C.A. Br. 1-2.

3. On appeal, petitioner contended that the district court had committed reversible error in refusing to submit the question of materiality to the jury. The court of appeals rejected that contention. Pet. App. 3a-13a.

In rejecting petitioner's challenge to his false statement convictions under 18 U.S.C. 1014, the court of appeals relied on this Court's decision in *United States* v. *Wells*, 519 U.S. 482 (1997), which held that materiality is not an element of that offense. Pet. App. 3a-5a. The court of appeals further held that, under the analysis in *Wells*, materiality is not an element of mail fraud (18 U.S.C. 1341), wire fraud (18 U.S.C. 1343), or

bank fraud (18 U.S.C. 1344). Pet. App. 6a-10a. Finally, the court of appeals held that, although materiality is an element of the offense of falsely subscribing to a tax return in violation of 26 U.S.C. 7206(1), and the district court erred in failing to submit the issue of materiality to the jury on those counts, the error was harmless, because "materiality was not in dispute regarding [petitioner's] tax fraud offense." Pet. App. 12a. The court of appeals observed that, under the tax statute at issue, "any failure to report income is material," and petitioner's "convictions were based on his failing to report $1,372,360 in income in 1985 and $4,355,766 in income in 1986." *Ibid.* Indeed, the court noted, petitioner did not contest the materiality of these sums of unreported income. *Ibid.* Accordingly, the court found that the error "did not contribute to the verdict obtained." *Id.* at 13a (quoting *Yates* v. *Evatt*, 500 U.S. 391, 403 (1991)).

DISCUSSION

1. Petitioner contends (Pet. 20-25) that the courts of appeals are in conflict on the question whether materiality is an element of mail fraud under 18 U.S.C. 1341, wire fraud under 18 U.S.C. 1343, and bank fraud under 18 U.S.C. 1344. Although the court of appeals correctly held that materiality is not an element of those offenses, we agree with petitioner that there is a conflict among the courts of appeals on the question and that the conflict warrants this Court's review.

a. Sections 1341, 1343, and 1344 of Title 18 criminalize various kinds of conduct involving schemes or artifices to defraud or to obtain money or property "by means of false or fraudulent pretenses, representations, or promises." Section 1341 prohibits the use of the mails as part of such a scheme; Section 1343 prohibits the use of wire, radio, or television communica-

tions as part of such a scheme; and Section 1344 prohibits such schemes involving financial institutions. Unlike many other federal criminal statutes, Sections 1341, 1343, and 1344 do not use the word "material" in defining the offense. "Thus, under the first criterion in the interpretative hierarchy, a natural reading of the full text, materiality would not be an element of" those offenses. *United States* v. *Wells*, 519 U.S. 482, 490 (1997) (citation omitted).

There is no basis for importing into those criminal statutes civil law notions of what is required for an action in fraud. Although civil torts sounding in fraud do typically "require[] a *material* misrepresentation or omission," *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 579 (1996), Sections 1341, 1343, and 1344 reach more broadly than civil tort law does. For example, a civil action sounding in fraud will generally lie only if the victim justifiably relies to his detriment on the defendant's deceptive statements or conduct. See Restatement (Second) of Torts § 537 (1977); 1 J. Story, *Commentaries on Equity Jurisprudence* §§ 199, 202-203 (13th ed. 1886). Sections 1341, 1343, and 1344, however, impose no such requirement. See, *e.g.*, *United States* v. *Coffman*, 94 F.3d 330, 333-334 (7th Cir. 1996), cert. denied, 117 S. Ct. 1425, 1426 (1997). See generally *Durland* v. *United States*, 161 U.S. 306, 312-315 (1896) (predecessor of mail fraud statute "is broader" than common-law doctrine of "false pretences"; "[i]t was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed").

The mail, wire, and bank fraud statutes prohibit schemes and artifices that are intended to defraud, and it suffices to establish a violation of those provisions

that the defendant *intended* that his deceptive conduct or statements would deprive the victim of some right or interest. There is no basis to impose the additional requirement, connoted by the word "material," that the deceptive conduct or statements *in fact* had "a natural tendency to influence, or [were] capable of influencing" the victim. *United States* v. *Gaudin*, 515 U.S. 506, 509 (1995) (defining "materiality").

b. The courts of appeals have reached conflicting conclusions on the question whether materiality is an element of Sections 1341, 1343, and 1344. See Pet. 21-22 & nn.10-11. Although many of the decisions petitioner cites antedate this Court's decision in *Wells*, the conflict has persisted and shows no sign of abating. The Eleventh Circuit in this case relied on *Wells* in holding that materiality is not an element of Sections 1341, 1343, and 1344. Pet. App. 3a-10a. The Tenth Circuit has reiterated, after *Wells*, its view that

> [a]lthough materiality is not an independent element of a wire fraud prosecution, there is a materiality aspect to the determination whether the acts of an accused give rise to a scheme to defraud, that is appropriately submitted to the jury as one component of the larger factual question as to the existence of fraud and a scheme to defraud.

United States v. *Cochran*, 109 F.3d 660, 667 n.3 (10th Cir. 1997) (quotation marks omitted). See also *United States* v. *Slaughter*, 128 F.3d 623, 629 (8th Cir. 1997) (after *Wells*, adopting Tenth Circuit's approach).

The Second, Sixth, and Ninth Circuits, in contrast, have held, after *Wells*, that materiality is an element of various of the offenses at issue. See *United States* v. *Rodriguez*, 140 F.3d 163, 167 (2d Cir. 1998) (Section 1344); *United States* v. *DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998) (Section 1341); *United States* v. *Nash*, 115 F.3d 1431, 1436 (9th Cir. 1997) (Section 1344), cert. denied, 118 S. Ct. 1054 (1998). The Fifth and Seventh Circuits, finally, have treated the issue as an open one in light of *Wells*. See *United States* v. *Moser*, 123 F.3d 813, 825-827 (5th Cir.) (Section 1341), cert. denied, 118 S. Ct. 613, 642, 884 (1997); *United States* v. *Pribble*, 127 F.3d 583, 588 (7th Cir. 1997) (Section 1344), cert. denied, 118 S. Ct. 1056 (1998).

The conflict merits this Court's review. Mail fraud, wire fraud, and bank fraud are frequently prosecuted offenses. Moreover, as petitioner correctly notes (Pet. 25), they are often included as predicate offenses in both criminal and civil cases under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.* The Court should grant the petition to resolve the question whether those offenses include an element of materiality.

2. Petitioner also challenges (Pet. 15-20) the court of appeals' decision to conduct harmless-error review of the district court's failure to instruct the jury on whether petitioner's false statements on his tax returns were material.[1] Petitioner notes (Pet. 9-14) that there

[1] The harmless-error question arises only if there was an error. Section 7206(1) provides that it is an offense to subscribe to a tax return under penalty of perjury when the taxpayer does not believe the return "to be true and correct as to every material matter." The court of appeals rejected the government's argument that there was no error at all because false statements concerning income on a tax return are "material" as a matter of law. Pet. App. 10-11a. Although one court of appeals has accepted the argument that the materiality of false statements of income in a prosecution under Section 7206(1) presents a legal question for the court, see *United States* v. *Klausner*, 80 F.3d 55, 60-61 (2d Cir. 1996), the other courts of appeals that have addressed the issue have concluded that *United States* v. *Gaudin*, *supra*, requires

is a conflict among the courts of appeals on the question whether the erroneous failure to instruct the jury on an element of an offense is subject to harmless-error analysis. Although the court of appeals resolved that question correctly by holding that such an error can be harmless, the conflict on that issue warrants this Court's review.[2]

"[I]f the defendant [in a criminal case] had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose* v. *Clark*, 478 U.S. 570, 579 (1986). The Court has identified certain fundamental constitutional errors—so-called "structural" errors—that are never harmless.[3]

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submission of the materiality issue to the jury. See Pet. App. 11a (collecting cases). We do not press here any argument that the district court was correct in withholding the issue of materiality from the jury on the Section 7206(1) counts.

[2] Because it held that Sections 1341, 1343, and 1344 did not require proof of materiality, the court of appeals did not reach the government's alternative argument on those counts that any error was harmless because (1) petitioner did not dispute materiality; (2) the proof of materiality was overwhelming; and (3) no reasonable jury could have failed to find materiality in light of the jury's finding that petitioner "intended to deceive others and to obtain by false or fraudulent pretenses, representations or promises money or property from persons so deceived." See Gov't Supp. C.A. Br. 9-10 (quoting from trial transcript); Gov't Second Supp. C.A. Br. 16-34. If this Court were to conclude that materiality is an element of any of those offenses, those harmless-error arguments would have to be confronted.

[3] See *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand jury); *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984) (denial of public trial); *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of self-representation); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (total denial of counsel); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (biased judge).

The failure to submit an element to the jury for its decision, however, is not such an error. See *California* v. *Roy*, 519 U.S. 2, 5 (1996) (per curiam) ("The specific error at issue here—an error in the instruction that defined the crime—is * * * as easily characterized as a misdescription of an element of the crime[] as it is characterized as an error of omission. No one claims that the error * * * is of the 'structural' sort that defies analysis by 'harmless error' standards."; "The case before us is a case for application of the 'harmless error' standard.") (quotation marks and citation omitted). See also *Johnson* v. *United States*, 117 S. Ct. 1544, 1550 (1997) ("It is by no means clear" that the failure to submit the element of materiality to the jury constitutes structural error.).

Petitioner properly concedes (Pet. 16-19) that a failure to instruct the jury on an element is harmless if the jury's verdict on another element is "functionally equivalent" to a finding by the jury as to the omitted element. See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993). The question raised by the court of appeals' decision is whether the failure to instruct the jury on an element is also harmless if the existence of the element "was not in dispute" (Pet. App. 12a), in the sense that it was not contested by the defendant at trial and the proof on the element was overwhelming.[4] Contrary to

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[4] A number of the courts of appeals, including the court below, employ a particularized definition of "materiality" applicable to the offense of falsely subscribing to a tax return under 26 U.S.C. 7206. See Pet. App. 12a ("Under § 7206(1), a 'material matter' is any information necessary to a determination of a taxpayer's income tax liability"; citing cases). Under that definition, a jury's finding that a defendant falsely stated the amount of his income will often

petitioner's claim (Pet. 15-19), this Court's cases do not conclusively resolve the question.[5] And the courts of appeals have given conflicting answers. The Eleventh Circuit has held that the failure to instruct on an element is harmless error where the evidence leaves no doubt on the issue and the issue is "uncontroverted." See *United States* v. *Fern*, 117 F.3d 1298, 1307-1308 (11th Cir. 1997); Pet. App. 11a-13a; cf. *Hart* v. *Stagner*, 935 F.2d 1007, 1013 (9th Cir. 1991) (mandatory presumption as to element harmless where, *inter alia*, defendant did not contest element at trial).[6] The

be the "functional equivalent" of a finding of materiality. Cf., *e.g.*, *ibid.* ("any failure to report income is material") (quoting *United States* v. *Holland*, 880 F.2d 1091, 1096 (9th Cir. 1989)). Cases arising under Section 7206(1) therefore may raise somewhat distinctive harmless-error issues. The court of appeals in this case, however, rested its harmlessness holding on the absence of a dispute at trial on materiality, not on a conclusion that the jury's verdict on other elements was the "functional equivalent" of a verdict on materiality under Section 7206. Pet. App. 12a. More generally, the courts of appeals have reached conflicting conclusions on the harmlessness of a failure to instruct on materiality under Section 7206. Compare Pet. App. 11a-13a (error harmless where element not disputed), with, *e.g.*, *United States* v. *DiRico*, 78 F.3d 732, 737-738 (1st Cir. 1996) (error harmful).

[5] Last Term the Court considered but did not decide the closely related question whether the failure to instruct on an element is harmless if the defendant affirmatively admits the existence of the element. See *Rogers* v. *United States*, 118 S. Ct. 673 (1998) (dismissing writ as improvidently granted).

[6] Petitioner suggests that the Second and Eighth Circuits have also so held. See Pet. 10 n.4 (citing *Bilzerian* v. *United States*, 127 F.3d 237, 242 (2d Cir. 1997), petition for cert. pending, No. 97-1892, and *United States* v. *Raether*, 82 F.3d 192, 194 (8th Cir. 1996)). In *Bilzerian*, however, the court found the absence of a materiality instruction on two counts to be harmless in light of the jury's finding on two other counts that the same statements were

Fourth Circuit, in contrast, has reversed a conviction on the ground that the district court failed to instruct on an element, even though the element—whether a credit union was federally insured—was not disputed and the proof of the element was overwhelming. *United States* v. *Johnson*, 71 F.3d 139, 141-145 (1995). Other courts have also concluded that the failure to instruct the jury on an element is reversible error even if "the jury could not have reasonably arrived at any other conclusion." *Waldemar* v. *United States*, 106 F.3d 729, 732 (7th Cir. 1996) (court does not expressly indicate whether issue was contested); see *United States* v. *DeFries*, 129 F.3d 1293, 1311-1312 nn.12-13 (D.C. Cir. 1997) (issue contested); *United States* v. *DiRico*, 78 F.3d 732, 735-736 (1st Cir. 1996) (same). See also, *e.g.*, *United States* v. *Raether*, 82 F.3d 192, 194-195 (8th Cir. 1996).

The conflict merits review by this Court. Whether a failure to instruct on an element is harmless error when the element's existence was not in dispute—as the record in this case abundantly showed—is a recurring and important question. The Court should grant the petition to resolve the conflict among the courts of appeals on that question.

material. 127 F.3d at 242. In *Raether*, the Eighth Circuit held that the failure to instruct on an element required reversal, and suggested that such errors can be harmless only if the jury has made a finding that is functionally equivalent to the omitted element. 82 F.3d at 194-195. Petitioner concedes (Pet. 16 n.9) the validity of that form of harmless-error analysis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1998

Supreme Court, U.S.
FILED
NOV 25 1998
CLERK

No. 97-1985

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ELLIS E. NEDER, JR., PETITIONER,

v.

UNITED STATES, RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 9, 1998
CERTIORARI GRANTED OCTOBER 13, 1998

268 P

TABLE OF CONTENTS

Page

Relevant Docket Entries Not Included ii

Relevant Docket Entries in the District Court 1

Relevant Docket Entries in the Court of Appeals 32

Indictment 33

Defendant's Opening Statement to the Jury 144

Excerpts from the Transcript of Proceedings 163

Excerpts of Jury Charge Conference 163

Excerpts of Bench Ruling on Materiality 166

Defendant's Closing Statement to the Jury 167

Court's Instructions to the Jury 238

RELEVANT DOCKET ENTRIES NOT INCLUDED

The following judgment and opinion have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for a Writ of Certiorari:

Judgment of the United States District Court for the Southern District of Florida, dated September 15, 1992 . . . . . 14a

Opinion of the United States Court of Appeals for the Eleventh Circuit, dated March 19, 1998 . . . . . 1a

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v.

ELLIS E. NEDER, JR.

No. 91-175-CR-J-16

RELEVANT DOCKET ENTRIES

08/23/91	1	INDICTMENT RETURNED AT JACKSONVILLE, FLORIDA (ALL DEFTS)
08/23/91	2	AO 257 Defendant Information Sheet filed (NEDER)
08/23/91	15	MOTION for Capias. (NEDER)
08/23/91	16	ORDER GRANTING Motion for Capias and a capias (NEDER) shall issue for the Deft's arrest. Upon Motion of the U.S. the Indictment shall remain sealed until the Deft is taken into custody. /s/HTS (Parties notified)
08/23/91	*	WARRANT for Arrest issued as to all Defts listed in documents 15 through 38.
10/15/91	*	Appearance Bond: 250,000 PRB sucured by the 2 pro-parties in Fla. and COS by Deft's Son and Father-in-law and PSA., Posting of Property and Father Cosign, by 10-15-91.

10/15/91	144	RECORD OF HEARING: INITIAL APPEARANCE HTS (NEDER) Deft appeared with retained counsel, Thomas Fallis Mr. Fallis announced he will no longer be retained after this date. Deft arrested in New York, appeared before U.S. Magistrate Judge , ordered to report to the M/D of Florida. Deft advised of charges, penalties and special assessment & rights Further inquiry re: counsel/indigency scheduled for 10/16/91, 2:00 p.m. Bond previously set in S/D of New York. Govt requests the Court re-visit the matter of bond. Bond Reset: $250,000 c/s Conditions of Release: travel is restricted to M/D of Florida and S/D of New York. Contact PTS telephonically every Monday, Wednesday and Friday. Prior to release Deft: shall provide the Court with a satisfactory address where he will be residing when in Jacksonville, FL to answer to the charges. The court shall conduct a Nebbia hearing to determine the source of collateral being utilized in posting the bond. Pending in this District, he shall not change his New York address without prior permission of the Court.
10/15/91	145	ORDER Setting Conditions of Release. /s/ HTS (NEDER) (Parties notified)
10/16/91	153	RECORD OF HEARING: STATUS RE COUNSEL HTS (NEDER) Thomas Fallis appearing for limited purposes. Argument by parties. C. Hugh Blanton, Jr., is appointed upon motion of the U.S., Deft

		may be required to reimburse in whole or in part for attorney fees/costs. Arraignment: 10-16-91, 4:00 p.m.
10/16/91	155	RECORD OF HEARING: ARRAIGNMENT HTS HTS Hearing on Motion to Modify Conditions of Pre-Trial Release (152) and Arraignment (NEDER) Hugh Blanton telephonically communicated with Judge Snyder's Chambers and indicated that he was unable to accept appointment. Thomas Fallis is appointed to represent Deft. ARRAIGNMENT: Deft advised of rights, charges penalties and special assessment. Not guilty plea entered. Court defers ruling on Motion, Deft to supplement Motion by noon, 10/18/91. Hearing: 10/21/91, 10:30 a.m.
10/16/91	157	ORDER: 1. All pretrial and discovery motions (NEDER) including any motions to dismiss and/or sever, shall be filed, and copies served on counsel for the U.S., on or before 10/24/91. The U.S. shall orally reply to the motions at the discovery hearing scheduled for 10/29/91, 9:00 a.m. 2. Pursuant to the order resulting from the discovery hearing, the U.S. shall disclose discovery materials no later than 11/1/91. Any motions prompted by a review of the discovery materials shall be filed on or before 11/13/91, and the U.S. shall reply to the motions on or before 11/20/91. An Evidentiary hearing and or oral argument on any motions filed will be held on 11/21/91, 9:00 a.m. /s/HTS (Parties notified)

10/16/91 158 ORDER Appointing Thomas Fallis, Esquire as (NEDER) counsel for Deft. Upon motion of the U.S., Deft may be required to reimburse the U.S. in full or in part for attorney's fees and costs. /s/HTS (Parties notified)

10/17/91 160 RECORD OF HEARING: STATUS CONFERENCE JHM (ALL DEFTS) Estimated length of trial: 2 months - Jury. Peremptory Challenges allowed: Govt - 13; Deft-22 Counsel for Deft directed to designate lead counsel. All Defts will file waiver of Speedy Trial through 3/18/92. Court Orders separate jury panel for trial of this case. Govt directed to furnish Court with summary of Indictment 5 days prior to trial. Jurors will be allowed to take notes at trial. Counsel are directed to make arrangements with Court Reporter in advance of trial date if daily copy is anticipated. Trial is continued until 2/18/92, A Status Conference will be for 2/7/92, 9:00 a.m. JHM Plea Agreement deadline: 1/31/92, 5:00 p.m.

10/18/91 167 WAIVER of Speedy Trial through 3/18/92 (NEDER)

10/18/91 193 AMENDED SCHEDULING ORDER: (ALL DEFTS) 1. All pretrial and discovery motions, including any motions to dismiss and/or sever, shall be filed on or before 10-30-91. The U.S. shall reply in writing on or before 11-08-91. The discovery hearing is scheduled for Thursday 11-14-91 at 9:00

a.m. 2. Pursuant to the Order resulting from the discovery hearing, the U.S. shall disclose discovery materials no later than 11-19-91. Any motions prompted by a review of the discovery materials shall be filed on or before 12-13-91 and the U.S. shall reply to the motions on or before 01-02-92. An evidentiary hearing and/or oral argument will be held on 01-07-92 at 9:00 a.m., before HTS (parties notified.

10/24/91 207 WARRANT returned executed by U.S. marshal by (NEDER) arresting deft on 10-15-91

10/29/91 219 MOTION for Adoption; by deft of deft Fogg's (NEDER)

a) Motion to Disclose confidential Informants (92)
b) Motion for Identification and Assurance of Production of Materials which are questionably considered to be "Jencks Materials" & MEMO (191)
c) Motion for Notice by the Govt of Intention to Rely Upon Other Crimes Evidence (180)
d) Motion for Appointment of Real Estate Appraisers (179)
e) Motion to Produce All Appraisals & Work Sheets
f) Motion for Names, Addresses and Statements of Individuals not be called as Witnesses/MEMO (187)
g) Motion for Disclosure of Criminal Records of govt witnesses and Co-defts. (188)

i) Motion to Compel Immediate Disclosure of Brady (189)
j) Motion to Interview Prospective govt witnesses (190)

11/12/91 398 MOTION to Adopt deft SMITH's Motion to Dis- (NEDER) miss; by deft /MEMO

11/12/91 399 MOTION to Adopt deft ARINGTON's Motion to (NEDER) Dismiss; by deft /MEMO

11/12/91 400 MOTION Adopt deft TURNER's Motion to Dismiss (NEDER) by deft /MEMO

11/12/91 401 MOTION to Adopt Deft FREEMAN's Motion to (NEDER) Dismiss; by deft /MEMO

11/12/91 402 MOTION to Adopt deft MARSH's Motion to Dis- (NEDER) miss; by deft /MEMO

11/12/91 403 MOTION to Adopt deft MANNS' Motion to Dismiss (NEDER) by deft /MEMO (392)

11/12/91 404 MOTION to Dismiss by deft /MEMO (various cts) (NEDER)

11/12/91 405 MOTION to Adopt deft MOORE's Motion to Dismiss (NEDER) by deft /MEMO

11/12/91 406 MOTION to Adopt deft KING's Motion to Dismiss (NEDER) by deft /MEMO

11/12/91 407 MOTION to Adopt deft MCDANIEL's Motion to (NEDER) Dismiss; by deft /MEMO

11/12/91 408 MOTION to Adopt deft MILLIS' Motion to Dismiss (NEDER) by deft /MEMO

11/14/91 448 Deft's Motion for Adoption, (219) is GRANTED. Accordingly, deft is permitted to adopt the motions specified therein, except for 1(d). The rulings entered thereon shall apply. As to 1(d), this ruling is without prejudice to deft filing his own motion within 5 days, if appropriate. Motion for Disclosure of Electronic Surveillance (220) is GRANTED to the extent required by F.R.Cr.P.12(d)92), 16(a)(1)(A) and (C); otherwise DENIED. However, the U.S. has represented there is no electronic surveillance of which it is aware involving deft or his premises relating to the charges in the Indictment. Deft's Motion for Preservation of Notes and Tapes, (221) is GRANTED to the extent all rough notes pertaining to this case in existence as of the date of this Order shall be perserved by any law enforement agency connected with the cause; otherwise DENIED. Motion for Production of Law Enforcement Inverview Reports or Notes with Individuals Who Will Not be Witnesses at Trial, (223) is DENIED. Motion for Transcription of Grand Jury Minutes, (224) is DENIED. However, the parties have agreed to the reciprocal exchange of Jencks Act material 3 calendar days prior to trial. Motion for Disclosure of Impeaching Information, (225) is GRANTED as to paragraphs 1 to the extent the U.S. has agreed to the disclosure of records or information revealing the felony convictions or guilty verdicts attributed to any govt witness and further

GRANTED limited to actual trial witnesses to the extent required by Brady; 2 to the extent the U.S. has agreed to the disclosure of prior criminal acts of govt witnesses, which are knwon to the U.S., relating to the witnesses' truth and veracity; 3 to the extent required by Brady and Gigilo, limited to actual trial witnesses and to the extent known or, by the exercise of due diligence, may become known to the U.S. Attorney, and of which the witenss is aware, excluding witness attendance fees and per diem payment 4 to the extent the U.S. does not oppose the request and further to the extent required by Brady & Giglio; 8 to the extent required by Brady; otherwise DENIED. Motion to Adopt Deft Fogg's Motion to Dismiss, (397) is GRANTED and he is permitted to adopt the motion to extent it is applicable to him. Motion to Adopt deft Smith Motion to Dismiss (398) is GRANTED to the extent it is applicable to him. Motion to Adopt deft Arington Motion to Dismiss, (399) is GRANTED. Motion to Adopt deft Turner's Motion to Dismiss, (400) is GRANTED. Motion to Adopt deft Freeman Jr's Motion to Dismiss (401) is GRANTED. Motion to Adopt deft Marsh's Motion to Dismiss, (402) is GRANTED. Motion to Adopt deft Manns' Motion to Dismiss, (403) is GRANTED. Motion to Adopt deft Moore's Motion to Dismiss, (405) is GRANTED. Motion to Adopt deft King's Motion to Dismiss, (406) is GRANTED. Motion to Adopt deft

McDaniel Motion to Dismiss, (407) is GRANTED. Motion to Adopt deft MILLIS" Motion ot Dismiss, (408) is GRANTED.

11/22/91	482	MOTION for Severance; by deft (NEDER)
11/22/91	483	MOTION for Adopt deft Arington's Motion for (NEDER) Severance/MEMO; by deft.
11/22/91	484	MOTION to Adopt deft Fogg's Motion for Sev- (NEDER) erance; by deft (396)
11/22/91	485	MOTION to adopt deft Smith's Motion for (NEDER) Severance; by deft (454)
11/22/91	486	MOTION to adopt deft Freeman's Motionfor (NEDER) Severance; by deft.
11/22/91	487	MOTION to Adopt deft King's Motion for (NEDER) Severance; by deft (481)
11/22/91	488	MOTION to Adopt deft Manns; Motion for (NEDER) Severance; by deft (472)
11/22/91	489	MOTION to Adopt deft Marsh;s Motion for (NEDER) Severance; by deft. (475)
11/22/91	490	MOTION to Adopt deft McDaniel's Motion for (NEDER) Severance; by deft (381)
11/22/91	491	MOTION to Adopt deft Millis' Motion for (NEDER) Severance; by deft (473)
11/22/91	492	MOTION to Adopt deft Moore's Motion for (NEDER) Severance; by deft (471)
11/22/91	493	MOTION to Adopt deft Turner's Motion for (NEDER) Severance; by deft (468)

11/22/91	494	MOTION to Adopt deft Susan Turner's Motion (NEDER) for Severance; by deft.
12/06/91	510	ORDER entered as to following motions: ALL DEFTS.) (442) Deft. Fogg's Second Supplemental Motion to Adopt - GRANTED; (443) Deft. Millis' Motion to Adopt Motions Filed by Co-Defts. - GRANTED; (446) Deft. McDaniel's Notice of Adoption for Motion to Dismiss, construed as a motion to adopt - GRANTED; (451) Deft. Arington's Supplemental Motion to Adopt Specific Discovery Motions of Co-Defts. - GRANTED; (455) Deft. Marsh's Motion to Adopt Discovery Motions of Specific Co-Defts. - GRANTED; (456) Deft. King's Motion to Adopt Discovery Motion of Deft. Turner - GRANTED; (460) Deft. Neder's Motion to Adopt Discovery Motion of Deft. Turner - GRANTED; (461) Deft. Neder's pleading entitled "Memo of Law", construed as Motion to Adopt Memo of Law in support of Deft. Turner's Motion for Bill of Particulars - GRANTED; (462) Deft. Freeman's Motion to Adopt Turner's Memo of Law - GRANTED; (474) Deft. Millis' Motion to Adopt Deft. Turner's Memo in Support of Motion for Bill of Particulars - GRANTED; (483) Deft. Neder's Motion to Adopt Deft. Arington's Motion for Severance - GRANTED; (484) Deft. Neder's Motion to Adopt Deft. Fogg's Motion for Severance - GRANTED; (485) Deft. Neder's Motion to Adopt Deft. Smith's Motion for

Severance - GRANTED; (486) Deft. Neder's Motion to Adopt Deft. Freemans Motion for Severance - DENIED, as Deft. has not filed such motion; (487) Deft. Neder's Motion to Adopt King's Motion for Severance - GRANTED; (488) Deft. Neder's Motion to Adopt Deft. Manss' Motion for Severance - GRANTED; (489) Deft. Neders Motion to Adopt Deft. Marsh's Motion for Severance - GRANTED; (490) Deft. Neder's Motion to Adopt Deft. McDaniel's Motion for Severance - GRANTED; (491) Deft. Neder's Motion to Adopt Deft. Millis' Motion for Severance - GRANTED; (492) Deft. Neders Motion to Adopt Moore's Motion for Severance - GRANTED; (493) Deft. Neder's Motion to Adopt Deft. Turner's Motion for Severance - GRANTED; (494) Deft. Neder's Motion to Adopt Susan Turner's Motion for Severance - DENIED, no such Deft. All parties are presumed to have adopted motions to dismiss and motions to sever filed by Co-Defts. U.S.A. to provide reasonable notice, per Federal Rule of Evidence 404(b) no later than 15 days before trial; Disclosure of identity of witnesses need not be made until 3 days prior to trial. U.S.A. may seek reconsideration of this ruling within 5 days. /s/HTS (parties notified)

12/13/91	532	CONSOLIDATED RESPONSE to Defts' Motions to (ALL DEFTS) Dismiss Specific Counts of Indictment; by govt.
02/18/92	710	RECORD OF HEARING. JURY TRIAL IN OPEN COURT JHM (NEDER, SMITH,

JR, SMITH & ASSOC. FOGG) Deft Smith's Motion for sequestered Voir Dire Examination of Jurors is DENIED. (689) Order filed in Open Court. Deft Neder's Motion to Compel govt to produce all releases (687); Motion for Restraining Order, (686); Motionfor Change of Venue, (685); and Supplemental Motion for Continuance, (684) are DENIED. Order entered and filed in Open court. Deft Neder renews all motions previously made - DENIED. Jury Empanelled - Swearing of Jury is deferred until February 24, 1992. All Jurors not engaged in this cause are excused with instructions to call Court after 6:00 p.m. today for further instructions.

02/25/92 - 733 RECORD OF HEARING. RESUMPTION OF JURY TRIAL FROM 2/18/92 JHM Deft Neder's Motion in limine, re: "high life style" evidence at trial - DENIED. Jury reports and are sworn to try the case. OPENING STATEMENTS of counsel. Govt's witnesses: Wm. G. Hall Jr., Hilda Eagerton, Carl Gray and Robert Beaty. Govt exhibits 1,2,496,21,22, 5 thru 20 ,24 to 34 filed in evidence. Recessed until 9:00 a.m. 2/26/92

02/26/92 734 RECORD OF HEARING. RESUMPTON OF JURY TRIAL IN OPEN COURT. HES (Continued from 2/25/92) Govt's Witnesses: Barry Hurtz, Linda Clary, Robert Harold White, C.W. Singletary, John Sulik, Sidney W.Register Jr., Christina Johnson, Robert Charles Nagel. Govt;s exhibits nos. 4,35

through 51, 55 through 60, 70, 71, 76, 97, 98, 99, 105, 119, 123, 124, 142, 143, 160, 164, 165, 166, 183, 188, 190, 191, 205, 209, 210, 229, 232, 235, 236, 332, 333, 356, 360, 361, 492, 78, 80, 82, 84, 81, 85, 79, 83, 87, 89 and 90 filed in evidence. Jury trial recessed until 9:30 a.m. 2/27/92 (NEDER,SMITH,SMITH & ASSOC. and FOGG)

02/27/92 735 RECORD OF HEARING. RESUMPTION OF JURY TRIAL IN OPEN COURT. HES (Continued from 2/26/92) Govt witnesses: Robert Charles Nagel, Mildred Duddington, Robert Dudding, Emmett Pacetti and Margo Dour. Govt's exhibits nos 52A,52B,52C, 53A,53B,53C,54,75,88,91 through 96,100 through 103,106 through 118,120,121,122, 126 through 140,149 through 156,158, 159,161, 162,163,167,168,170,171,501,529 & 530, filed in evidence. Court strikes over act #72 from the record. Jury trial recessed until 9:30 a.m., March 2, 1992 (NEDER, SMITH, SMITH & ASSOC. & FOGG)

03/02/92 737 RECORD OF HEARING: RESUMPTION OF JURY TRIAL IN OPEN COURT HES (Continued from 2/27/92) Govt witnesses: Marga Doerr, Meryl Susan Gold, Jane Solomon, Richard Earl Walker and James D. Statler. Govt exhibits nos. 141,157,176 through 181, 184 trhough 187,189,192 through 197, 198 A&B, 199, 215 through 218, 219 A through F, 499 & 528A through E, filed in evidence. Jury trial recessed until

9:30 a.m., March 3, 1992. (NEDER, SMITH,SMITH & ASSOC and FOGG)

03/03/92 739 RECORD OF HEARING: JURY TRIAL RESUMED HES (NEDER,FOGG (HES) (SMITH & ASSOC., & ROY SMITH) Govt witnesses: Arthur Martell, Francis Wankowing Delores Brock, DAve Phillips and Edward Salem. Govt exhibits Nos: 200 thur 204, 206, 207, 208, 211 thru 214, 220 thru 225, 227 thru 231, 233 thru 234, 237 thru 240, 346 thru 348, filed in evidence. Jury Trial recessed until 9:45 a.m., 3/4/92 (HES)

03/04/92 740 RECORD OF HEARING: JURY TRIAL RESUMED (NEDER FOGG (HES (SMITH & ASSOCS., & ROY SMITH) Govt. Witnesses: Jon H. Anderson, Yvonne Baker Mary Kerr, Geraldine Moreau, David Owen. Oral Motion by Defts. Fogg & Smith for Mistrial and or severance, joined in by Deft Neder - Denied. Govt. Exhibits nos. 144 through 147, 243 thru 259, 260A through G, 272, 278A, 350 thru 355, 357, 358, 359, 362 thru 367, 534 A throuhgh C, filed in evidence. Jury trial recessed until 9:45 a.m., 3/5/92 (HES).

03/05/92 741 RECORD OF HEARING: JURY TRIAL RESUMED HES (continued from 3-4-92) Government's Witnesses: Linda Alexson, John William Kerr, Jr., Frnak Armstrong Green, James Robert Pierce, Richard Moyers, Cheryl Whisnant, Janet Miller, Sylvia M. Sanders and Warren K. Anderson,

Jr.. Govt. Exhibits 242, 273, 274A 274B, 275A, 275B, 276A, 276B, 277A, 277B, 278A, 278B, 279A.., 279B, 280A, 280B, 281A, 281B, 282A, 282B, 283A, 283B, 284A, 284B, 285A, 285B, 286A, 286B, 287A, 287B, 288A, 288B, 289A, 289B, 290, 291A, 291B, 292A, 292B, 293A, 293B, 294, 296, 297, 298, 299, 301, 302, 303A through J, 308 through 317, filed in evidence. Jury trial recessed until 9:30 a.m., March 9, 1992. (NEDER,SMITH,FOGG)

03/09/92 750 RECORD OF HEARING: Resumption of jury trial in open court. (NEDER, SMITH, SMITH & ASSOC.&FOGG) Govt Witnesses: Janet Suzanne King, Ralph R. Crabtree, Lara Sue Waters, Janet Taylor, Ramona Hoskins, Howard Lewis Rundquist and Winifred Stewart. Govt exhibits nos, 295,300, 304,305,306,307,319C,321C-D-G-H,322A and 323 C&D, filed in evidence. Jury trial recessed until 03/10/92 at 9:30 a.m.

03/10/92 751 RECORD OF HEARING. Resumption of jury trial in open court. (NEDER,SMITH, SMITH & ASSOC. & FOGG) Govt witness: Michael Loyd, Judy McQuaide, Irwin Michael Carasso, Stephen Donelan, William G Cooper Michelle Antlec. Juror note: re: acquaintance with govt witness, filed in open court - to be sealed. Court and counsel confer with juror and juror returns to the jury room. Govt exhibits nos. 173,174,175, 320A through 320H, 321A,321B,321E, 321F,322B through 322F,323A & 323B,

324A through 324E,325,326A through J, 330,335,336,338 through 345,470,472A through 472C, filed in evidence. Jury trial recessed until 9:30 a.m. 3/11/92 Court and counsel to confer at 9:15 a.m.

03/11/92 756 RECORD OF HEARING. Resumption of jury trial in open Court. HES (NEDER,SMITH, SMITH & ASSOC & FOGG) Govt Witnesses: Babette Fletcher, Carolyn J. Murphy, John H. Anderson - recalled, Paul Adler Govt exhibits nos 262,318,319A,319B,319D,33,334,368 through 376, 378 through 402, 404, 465, 466, 535A, 535B and 535C, filed in evidence. Deft Neder's exhibits nos 10, 17 & 13 filed in evidence Jury trial adjourned until 9:30 a.m. 3/12/92

03/12/92 757 RECORD OF HEARING. Resumption of jury trial in open court. HES (NEDER,SMITH, SMITH & ASSOC & FOGG) Govt witnesses: Stanley J. Burns, Brent Doolan, Jim D'Ambrosio, Greg Edmonds, Kay Green Jennings, Irene Ward, Marcus A. Fields, Jeffrey Simon, Robert M. Worthy, James A. Cochran, Lamar Long, Adair Harris, Govt exhibits nos. 407,409,411,413,414,415,416, 418 through 434, 436 through 439 441 through 443, filed in evidence. Jury trial recessed until 9:45 a.m. on March 16, 1992

03/16/92 762 RECORD OF HEARING: resumption of Jury trial in open court (continued from 3/12/92) #757 Govt witnesses: Doris L.

Ray, Phillip Grunman, Kevin S. Baker, Tom Timmons, Charles Bassett, Harold Everett, Michael Knuth, John D. Crawford, Mark S. Wood, Steven Edward Moore, Frankie Weddington. Govt exhibits nos 405,406, 408,410,412,417A, 417B,440,444 and 446, filed in evidence. Jury trial to recessed until 10:30 a.m. 3-17-92 (NEDER,SMITH, SMITH & ASSOC. & FOGG)

03/17/92 764 RECORD OF HEARING. (resumption of jury trial in open court) continued from 3-16-92 Govt witness: Stephen Wilerty and Ben Houdi.

03/18/92 769 RECORD OF HEARING. resumption of jury trial in open court. Continued from 3-17-92) HES Deft Neder reports to the Court through counsel, that he is ill. Court and Counsel Confer. Jurors are brought into open court and are excused to report at 9:20 a.m., trial is recessed until 9:30 a.m., 3/19/92 (NEDER, SMITH,SMITH & ASSOC. and FOGG) 30 Minutes

03/19/92 770 RECORD OF HEARING. resumption of jury trial in open Court. (continued from 3-18-92) HES Alternate juror #241, report telephonically that she has been involved in an automobile accident and will be late arriving - Court and counsel confer in open Court. Govt witnesses: Charles Tatelbaum, Stepehn Bruka, Paul Hagglund, Stephen Bean, Dale Beardsley, Brent Diehl, David Wrigley, F. Lowell Conlan Jr., Robert E. Roth, Harry John Smith. Govt exhibits nos.

61,62, 64 through 69, 72,73,74 264,266 268 through 271, filed in evidence. Jury trial recessed until 9:30 a.m., March 23, 1992. 6.0hrs.

03/23/92 774 RECORD OF HEARING; resumption of jury trial in open court. (continued from 3/19/92) HES 7.0 hrs Govt witness: Harry John Smith. Govt's exhibits nos. 489, 488, 504, filed in evidence.

03/24/92 781 RECORD OF HEARING: resumption of jury trial in Open Court. (continued from 3/23/92) 7.0 hrs. Court and Counsel confer re: charts exhibits Govt witnesses: Harry John Smith. Trial recessed until 9:30 a.m. March 25, 1992 HES

03/25/92 782 RECORD OF HEARING; resumption of jury trial in open Court. (continued from 3/24/92) HES 7.0 Govt witnesses: Stephen Jamir, Charles Rogers, Richard Sassi, Mary Millis, Janice Driggers. Deft Fogg's exhibit no. 7 marked for identification. The Court will hold a hearing on the Motion of Siguard Lucassen to Quash Subpoena Duces Tecum at 9:00 a.m., 3/26/92. Govt exhibit #543 filed in evidence. Trial recessed until 9:00 a.m. 3/26/92.

03/26/92 789 RECORD OF HEARING: resumption of Jury trial in open court (continued from 3/25/92) HES Outside presence of jury; Hearing on Motion of Sigaurd Lucassen to Quash Subpoena Duces Tecum-Argument of Counsel - Granted except as to paragraph 2 - Order to enter. Govt witnesses: Janice

Driggers (cont'd from 3/25/92), John Gay, Agent IRS. Govt. exhibits nos. 172,467,468,469, 473,474 and 542 received in evidence. Govt exhibits 160, 164,174,190,216,218,235 published to jury. Outside presence of jury deft Neder make oral motion for mistrial - DENIED. Court gives instructions to jurors re: testimony of witness John Gay. Govt rests. Jurors excused until Tuesday, March 31, 1992, at 1:30 p.m. Oral motion for judgment of acquittal as to deft Fogg argued. Court will hear the motions pursuant to Rule 29 (judmgment of acquittal) on Tuesday, March 31, 1992 at 9:30 a.m. Recessed until 3-31-92 at 9:30 a.m. 6.0 hrs.

03/31/92 800 RECORD OF HEARING. resumption of jury trial. (continued from 3/26/92) HES Counsel for deft Smith, Neil P. McLoughlin reported ill - not present. Court directs the Clerk to call off jurors from reporting at 1:30 p.m., this date. US. Attorney orally moves to dismiss Cts. 24, 25 and 29 of the Indictment - Granted. Smith case is estimated for 2 days; Neder case is estimated for 2 ½ days (will begin Monday morning) Fogg case is estimated for 2/3 days. Argument on Motions for judgmment of acquittal will be resumed tentatively at 8:30 a.m., April 1, 1992. (If Mr. McLoughlin is present) 1:30 p.m. Jurors not reached and reporting are: Juror Nos. 124, 226,119,69 and 95 (NEDER, SMITH, SMITH & ASSOC. & FOGG)

04/02/92 807 JUDGMENT; IT IS ORDERED that Deft Ellis E. Neder, Jr be discharged as to Counts 24, 25 and 29, and that Deft Roy F. Smith, Jr., Roy F. Smith, Jr & Associates, Inc. and Peter A. Fogg be discharged as to Count 24 of the Indictment and allowed to go hence without day for their return as to said counts. s/3/31/92 HES (parties notified) (NEDER, SMITH,SMITH & ASSOC & FOGG)

04/02/92 808 RECORD OF HEARING. resumption of jury trial continued from 3/31/92) HES Deft Smith's oral motion for judgment of acquittal. Argument in opposition of the defts' motions for judgment of acquittal presented by the govt. Govt exhibit #125 withdrawn - the Court directed that it will be marked for identification. Court will reconvene at 3:30 p.m. U.S. amended motion to quash subpoenas shall be heard on Monday April 6, 1992. The Court shall enter an order striking the following overt acts from Count One: 1,2,40-57,72, 74,87,89,98,103,149,155,160,172 and 173. Also, as to Count 89, the Court strikes the predicate racketeering counts 4(a),5 & 9. Based on a recent ruling by the 11th circuit Court of Appeals, the Court shall permit the defts to present expert tax testimony. The defts announced that the defense will not be as follows: NEDER - 5-7 days; SMITH - 3-5 days; FOGG - 2-3 days. Defts' motions for judgment of acquittal are denied. Trial

recessed until 9:30 a.m. 4/6/92 (NEDER, SMITH,SMITH & ASSOC.&FOGG)

04/06/92 810 RECORD OF HEARING. resumption of jury trial HES (continued from 4/2/92) Deft Neder's Witnesses: Thomas H. Fish, Susan H. Sprague, Boachl, Stanley J. Burns (previously called by govt) Deft Neder's exhibits nos. 2 through 6, and 20, filed in evidence. Jury trial recessed (Jurors excused until 9:30 a.m. 4/7/92) Hearing on govt's Motion to Quash (continued to 4/7/92 at 9:00 a.m.)

04/07/92 811 RECORD OF HEARING. resumption of jury trial. HES (continued from 3-6-92) NEDER,SMITH,SMITH & ASSOC. & FOGG) Arguments continued outside presence of the jury on govt's Motion to Quash Subpoenas (801) - Deft Smith will not call proposed witness Kubinsky, thereby rendering govt's Motion moot as to said witness - govt's motion to quash as to potential witness Hauberg is denied. Deft Neder's witness: Paul Hagglund (previously called by the govt., Thomas Washington Brook's III, Robert E. Roth (previously called by govt.) - this witness placed on stand but no testimony taken. Trial recessed until 9:30 a.m. 4/8/92)

04/08/92 814 RECORD OF HEARING: resumption of jury trial HES (continued from 4/7/92) (NEDER, SMITH,SMITH & ASSOC.& FOGG) Counsel for deft, Neder reports his deft is ill and not present in the Courtroom.

Court has the Clerk contact Ms. Pamela Bob of Pretrial Services to consult on a Medical Examination for Mr. Neder at Keeton Corrections (formerly Bannum Place) After consultations with Ms. Bob, the Options are an Acute Care Facility to close to Keeton Corrections or transportation to University Hospital under U.S. Marshal supervision. Mr. Neder is reluctant to leave Keeton Facility. Order to Enter for remand to U.S. Marshal for transportation to University Hospital. Court directs deft Smith to be ready for 4/9/92 (est. 6 witnesses) 10:05 a.m. Jury brought in and advised of deft Neder illness and instructed to call the Code a Phone this evening. Trial recessed until 9:30 a.m. 4/9/92.

04/13/92 824 RECORD OF HEARING. Resumption of jury trial. (NEDER (continued from 4/8/92) SMITH,SMITH & ASSOC.&FOGG) Deft Neder's witnesses: Ellis E. Neder, Jr. Deft Deft Neder's exhibits; 105,7,9,12,18,16,24, 27,122, 28,34; filed in evidence. Deft Fogg's supplemental witness list field in open court. Deft Smith's supplemental witness list filed in open court. Argument on deft's exhibit no. 1 - objection overruled, but not yet admitted. Jury dismissed at 4:45 p.m. Trial recessed until 9:00 a.m. 4/14/92

04/14/92 828 RECORD OF HEARING. Resumption of jury trial. 7.0 hrs (continued from 4/13/92) (824) Deft Neder's exhibits; 35, 37, 36, 38, 40, 39, 42, 43, 52, 53, 54, 60, 59, 57, 64, 46, 47, 49, 48, 66, 67, 69 filed in evidence.

Jury excused at 4:35 p.m. Trial recessed until 9:30 4/15/92

04/15/92 830 RECORD OF HEARING: resumption of jury trial HES (continued from 4/14/92) 6.5 Deft Neder's witness: Ellis E. Neder, Jr. (resumption of direct examination) Deft Neder's exhibits: 78,75,73,71,72,70,84, 85,86,87,88,89,90, 77,76,81,83; filed in evidence. Govt's exhibits 471 filed in evidence. Deft Neder's oral motion for mistrial - denied. Trial recessed until 9:25 a.m., 4/16/92 (NEDER,SMITH,SMITH & ASSOC., FOGG)

04/16/92 831 RECORD OF HEARING. resumption of jury trial HES 7.0 Deft Neder's witness: Ellis E. Neder, Jr. (cross examination continued) Deft Neder's Verbal motion for mistrial - denied. Deft Neder's exhibit no.1 filed in evidence. Govt's exhibit lsit 544, filed in evidence. Trial recessed until 9:30 a.m. April 20, 1992.

4/20/92 832 RECORD OF HEARING. resumption of jury trial HES 6.0 Deft Neder announced rest. Deft Smith's witnesses: Martin Williams, Jr., Mary Reynolds, Robert O'Neill, Nancy Zysk, Marvin Boutwell, Frank Lucente, Warren Dentrick, Irwin Goldberg. Govt's exhibits 547 and 548 marked for identification. Deft Smith's exhibit 1 marked for identification. Deft Smith's exhibit 2 marked for identification.- Trial recessed until 9:30 a.m. 4/21/92

04/21/92 835 RECORD OF HEARING: JURY TRIAL RESUMED HES 6.0 Deft. Smith's Witness: John Sulik (NEDER,SMITH,FOGG) The Govt's Notice of Filing amended redacted copy of Indictment, filed in open Court on 4/20/92 Deft. Smith announced rest. Deft's Fogg's witnesses: Eugene Peek, Fernis M. Scurry. Trial recessed until 9:00 a.m., 4/22/92. The Court will tentatively hold a preliminary charge conference on 4/24/92.

04/22/92 836 RECORD OF HEARING. resumption of jury trial. HES 7.0 Deft Fogg's Witness: Timothy Kenneth Wilhort, Peter A. Fogg. Deft Fogg's exhibits nos. 10,11,12,13 & 14, filed in evidence. Deft Fogg rests. All defts verbally renew motions for Judgment of acquittal - Denied. Govt's Rebuttal witness: Thomas E. Turner. Govt's exhibit no. 547, filed in evidence. Trial recessed until 9:30 a.m. 4/23/92 (NEDER,SMITH, FOGG)

04/23/92 839 RECORD OF HEARING. resumption of jury trial (contin'd from 4/22/92) (NEDER, SMITH, FOGG) Govt rebuttal witness: Thomas E. Turner continued. Deft Neder's exhibits no. 63, filed in evidence and published to jury together with Court's exhibit No. 2, by counsel for deft Fogg. Jurors excused until 9:00 a.m. April 27, 1992. Trial recessed until 9:30 a.m. April 24, 1992.

04/24/92 840 RECORD OF HEARING: resumption of jury trial (continued from 4/23/92) (NEDER,

SMITH, FOGG) Conference held with Counsel on Jury Instructions. Jury is not present this date. Trial recessed until 4/27/92 at 9:00 a.m. HES 2.0

04/27/92 842 RECORD OF HEARING: resumption of jury trial (continued from 4/24/92 HES 6.0 (NEDER, SMITH & FOGG) Govt's Rebuttal witnesses: Linda Alexon, David Phillips, Charles Rogers/Witnesses Alexon, Phillips and Rogers - recalled) Lawrence C. Evans, Robert E. Johnson, Mary W. Coleman, Carolyn J. Murphy - recalled, Harris Johnson. Govt's exhibits nos. 551,553,548,549 and 554, filed in evidence. Deft Neder's exhibits nos. 134, filed in evidence (out of order) Govt rests rebuttal. Court deems all Rule 29 Motions renewed - same ruling applicable on motions as previously made.3:35 p.m. Jury excused to return at 9:00 a.m. on 4/28/92. Court and Counsel confer, re: jury instructions. 4:05 p.m. Court adjourned. Arguments of counsle will commence at 9:00 a.m. 4/28/92

04/28/92 844 RECORD OF HEARING. resumption of jury trial. HES 7.0 (continued from 4/27/92) (NEDER, SMITH & FOGG) Govt's initial closing argument. Deft Neder's closing argument. Upon stipulation of counsel a copy of deft Neder's exhibit No. 76 is substituted for the original, which was misplaced. Trial recessed until 9:00 4/29/92

04/29/92 845 RECORD OF HEARING. resumption of jury trial HES 7.5 (continued from 4/28/92) (NEDER, SMITH & FOGG) Deft Smith closing argument. Deft Fogg closing argument. Govt rebuttal. Court charges the jury. Jurors commence deliberation; with the exception of Alternate Jurors nos. 172, 92, 36 and 241 who are excused - to be contacted when the Jury has been discharged. Court instructs counsel to remain until 5:00 p.m. Phone numbers for counsel are given to the Clerk. Court received request (written) for Exhibit Lists for the Jurors. Deft Fogg and Smith object. Written Request filed as Court's exhibit no. 4. Jurors' request denied. Because of counsel descriptions on lists, it would not be advisable for them to use the lists for deliberations. Court excuses Jury for the day. Court to resume at 9:00 a.m. 4/30/92.

04/30/92 847 RECORD OF HEARING. resumption of jury trial. HES .5 (continued from 4/29/92) 9:00 - 9:05 court and counsel present - Jurors report in open court - Court directs jurors to resume their deliberation. 12:40 p.m. Jury question received, Court and Counsel Confer - Court responds to jury question. 12:50 p.m. 12:50 p.m. Luncheon meal catered to the jury by Court Security Office. 4:00 p.m. Note received from Jury requesting to be adjorned by 5;00 p.m. this date (Court's exhibit no. 7) 5:00 p.m., Jurors assembled in Courtroom with defts and counsel. Jurors excused until 9:00a.m.

May 1, 1992. (Note Mr. McLoughlin appears after Jury is excused) 5:10 p.m. Trial recessed until 9:00 a.m. May 1, 1992.

05/01/92 848 RECORD OF HEARING. resumption of jury trial HES (continued from 4/30/92) 1.0 hrs 9:00 a.m. court and Counsel present - Jurors report into open court - Court directs jurors to resume their deliberation. 9:10 a.m. 12:30 p.m. Luncheon meal catered to the jury by the Court Security Officer. 3:20 p.m. VERDICT as to the deft Ellis E. Neder, Jr. GUILTY on Counts 1 through 12, NOT GUILTY on Counts 13 through 20, GUILTY on Counts 21 through 23, GUILTY on Counts 26 through 28, GUILTY on Counts 30 through 72, GUILTY on Count 77 through 84 and GUILTY on Counts 86 through 90. (NEDER) VERDICT as to Defts (SMITH and SMITH & ASSOC) NOT GUILTY on Counts 1,7,8,13,14,15,18,19,21,22,27,28, 31,32,89 and 90. VERDICT as to deft. (FOGG) NOT GUILTY on Counts 1,7,8, 13,14,15,18,19,21,22,27,28,31,32, 89 and 90. Jury polled as to each verdict as published. Court sets forfeiture proceedigns as to the deft NEDER on Thursday, May 7, 1992 at 9:00 a.m. Defts Smith, Smith & Associates and Fogg ordered discharged and defts Bonds ordered exonerated. Jurors excused to return on Thursday, May 7, 1992 at 9:00 a.m. Court directs that alternate jurors be called to return for forfeiture proceedings. Govt moves orally for the deft

Neder's remand to the Marshal's custody pending further proceedings. Argument by counsel. Govt's motion to remand Deft Neder to Marshal's custody - GRANTED. Court adjudges the deft Neder guilty based on the verdict and remands him to custody. Court refers the case for pre-sentence investigation to the Probation Office, Mr. Fred Fortenberry. Sentencing for deft Neder set for July 17, 1992 at 2:00 p.m. 4:00 p.m. Court adjorned.

05/01/92 849 VERDICT FORM filed in open court. (848) (NEDER)

05/06/92 853 JUDGMENT: The Jury having returned a VERDICT (NEDER) of NOT GUILTY on some of the counts of the Indictment, counts numbered 13 through 20. IT IS ORDERED that deft, Ellis E. Neder, Jr., be discharged and allowed to go hence without day as to counts 13 through 20, some of the counts charged in the Indictment. s/HES (parties notified) MR 121/0163

05/07/92 876 REDACTED INDICTMENT, filed in open Court.

05/07/92 877 COURT's INSTRUCTIONS TO THE JURY, filed in open Court.

05/26/92 897 JUDGMENT AND ORDER OF FORFEITURE. Deft ELLIS E. NEDER JR. is liable to the U.S. for the amount of $31,636,083.39 which monies are hereby forfeited pursuant to 18 U.S.C. §1963(a)(3) to the U.S.A. for its full use and benefit as

proceeds the deft obtained directly or indirectly from racketeering activities in violation of 18 U.S.C. §1962. s/HES in Orlando this 26th day of May, 1962 nunc pro tunc to May 7, 1992. (parties notified) MR 121/0458

09/08/92 1008 RECORD OF HEARING. SENTENCING IN OPEN COURT. HES

09/08/92 1009 RESPONSE to Pre-Sentencing Report of 7/1/92; by deft Arguments on Contested issues in PSI Report. Court's findings on contested issues are as announced in open court. Court's exhibit no. 1 marked for identification. Deft is adjudged GUILTY on each of Counts 1 through 12, 21 through 72, 77, 78 through 84, 86, 87, 89 & 90 upon the jury verdict. SENTENCE ON GUIDELINE COUNTS: 5 Yrs. Imprisonment on each of counts 1,77,80,81,82, 83 & 84 - concurrently.; 3 Years imprisonment on each of counts 86 and 87, concurrent with each other and with sentence on Cts. 1, 77, 80, 81, 82, 83 and 84; 7 years and 3 mos. imprisonment on each count 89 and 90 to run concurrently with each other and concurrently with sentences on Counts 1, 77, 80, 81, 82, 83, 84, 86 & 87. SENTENCE ON NON-GUIDELINES COUNTS: 5 Years imprisonment on each of Counts 2 through 12, 21 through 72, 78 and 79, to run concurrently with each other and consecutive to the sentences imposed on counts 1, 77, 80, 81, 82, 83, 84, 86 and 87. TOTAL SENTENCE OF CONFINEMENT; 12

		YEARS and 3 MONTHS IMPRISONMENT. Pay Restitution: 1) $402,577.00 Carteret S & L; 2) $2,300,000.00 Amerifirst Fed. S & L.; 3) $1,300,000.00 Greyhound Leasing & Financial Corp.; 4) $1,778,419.00 Factimore Federal Savings; 5) $3,100,000.00 Security First Federal S & L.; 6) $10,265,000.00 United Brotherhood of Carpenters & Joiners of America; and 7) $5,900,000.00 Caribank TOTAL RESTITUTION: $25,045,996.00 due immediately
09/08/92	1008	RECORD OF HEARING. SENTENCING. CONTINUED (NEDER) SUPERVISED RELEASE: 5 years on each of counts 1, 77, 80 through 84, 86, 87, 89 and 90 upon Standards of Middle District of Florida and following SPECIAL CONDITIONS: 1. Pay unpaid balance of Restitution upon Release from Confinement. 2. Prohibited from incurring new credit charges, opening new lines of credit or obligating for major purchases without approval of P.O. in compliance with payment schedule. 3. Provide P.O. Requested financial information; and 4. Prohibited from engaging in employment related to Real Estate Development. SPECIAL ASSESSMENT: $3,800.00 due immediately Court recommends Commitment in Federal Institution at Jesup, Georgia. Remanded to U.S. Marshal. Appeal Information supplied in Open court.

10/31/95	--	RECORD ON APPEAL transmitted to USCA as to Ellis E. Neder Jr.: (ROA will consist of: PSI, 7 vol. pleadings; 9 boxes vol. exhibits; 46 vol. transcript.) (dgj) [Entry date 10/31/95]
1/18/96	--	RECORD ON APPEAL transmitted to USCA as to Ellis E.e 01/18/96]
2/28/96	--	SUPPLEMENTAL RECORD ON APPEAL transmitted to USCA as to Ellis E. Neder Jr.: (ROA will consist of: PSI, 1 vol. transcript.) (dgj) [Entry date 02/28/96]

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA

v.

ELLIS E. NEDER, JR.

No. 92-2929

RELEVANT DOCKET ENTRIES

09/21/92	District Court Order
09/30/92	Probable Jurisdiction Noted
01/27/94	Brief for Appellant
10/16/95	Brief for Appellee
12/28/95	Reply Brief for Appellant
02/27/96	Supplemental Brief for Appellant
07/18/97	Supplemental Brief for Appellant
10/10/97	Supplemental Brief for Appellee
10/10/97	Supplemental Reply Brief
01/13/98	Case Argued
03/19/98	Opinion Issued in Manuscript Form
03/19/98	Judgment Entered
04/23/98	Petition for Rehearing
06/08/98	Order Denying Rehearing
06/12/98	Notice of filing cert. on 6/9/98
06/18/98	Judgment and Opinion issued to Clerk as Mandate

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA JACKSONVILLE DIVISION

UNITED STATES OF AMERICA v. ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A. HORACE MARSH STEVEN A. MOORE HARVEY M. MANSS WILLIAM THOMAS FREEMAN, JR. JANET S. KING SANDRA McDANIEL MARY C. MILLIS MICHAEL J. ARINGTON ROY F. SMITH, JR. ROY F. SMITH, JR. & ASSOCIATES, INC. PETER A. FOGG	Case No.		91-175-CR-J-16
	Ct.	1	18 U.S.C. §371 (5 yrs/$250,000/both)
	Cts.	2-12, 73,77	18 U.S.C. §1344, 2 (5 yrs/$250,000/both)
	Cts.	13-20, 36-72 74-76	18 U.S.C. §1014, 2 (2 yrs/$250,000/both)
	Cts.	21-30, 34-35	18 U.S.C. §1341, 2 (5 yrs/$250,000/both)
	Cts.	31-33, 78-84	18 U.S.C. §1343, 2 (5 yrs/$250,000/both)
	Ct.	85	18 U.S.C. §1621 (5 yrs/$250,000/both)
	Cts.	86-88	26 U.S.C. §7206(1) (3 yrs/$250,000/both plus costs of prosecution)
	Ct.	89	18 U.S.C. §1962(c), 2 (20 yrs/$250,000/both)
	Ct.	90	18 U.S.C. §1962(d) (20 yrs/$250,000/both)

INDICTMENT

The Grand Jury charges:

COUNT ONE

A. INTRODUCTION

At all times material to this Indictment:

1. ELLIS E. NEDER, JR. was a Jacksonville attorney who engaged in various real estate developments utilizing a corporation known as Neder Properties, Inc., incorporated under Florida law. ELLIS E. NEDER, JR. purchased various parcels of real property as a director, officer, or acting on behalf of the following corporations:

a. First Frontier, Inc., a corporation registered under the laws of the State of Florida.

b. JBA, Inc., a corporation registered under the laws of the State of Florida.

c. AMH, Inc., a corporation registered under the laws of the State of Florida.

d. First Prospector, Inc., a corporation registered under the laws of the State of Florida.

2. ELLIS E. NEDER, JR. caused the creation of the following corporations and the transfer of various parcels of real property from the corporations cited in number 1 above and the following corporations to ELLIS E. NEDER, JR. or a partnership involving ELLIS E. NEDER, JR.:

a. Islands of San Sebastian, Inc., a corporation registered under the laws of the State of Florida.

b. T.E.A.E., Inc., a corporation registered under the laws of the State of Florida.

c. Pt. Reddie, Inc., a corporation registered under the laws of the State of Florida.

d. RBB, Inc., a corporation registered under the laws of the State of Florida.

e. Reddie Point, Ltd., a partnership registered under the laws of the State of Florida.

3. ELLIS E. NEDER, JR., THOMAS C. TURNER, and STEVEN A. MOORE, created a corporation, E.A.T. Investors Equity, Inc., registered under the laws of the State of Florida, to secretly provide funds for individuals to place deposits for purchase and sale contracts for a condominium project known as Southern Grove.

4. ELLIS E. NEDER, JR. utilized a corporation, Management Constructors, Inc., registered under the laws of the State of Florida, as a general contractor for the construction loan obtained from the United Brotherhood of Carpenters and Joiners of America for the project known as Reddie Point.

5. ELLIS E. NEDER, JR. utilized a corporation, The View, Inc., registered under the laws of the State of Florida, to attempt to obtain a multimillion dollar land development loan for a project known as The View.

6. ELLIS E. NEDER, JR. acquired the following parcels of real property and sought to develop those properties under the following project names:

a. One parcel of real property, approximately 4 acres, located in Duval County, Florida known as Rose Creek.

b. Two parcels of real property, approximately 4 acres and 1.15 acres, located in Duval County, Florida known as Cedar Creek.

c. Two parcels of real property, approximately 14.7 acres and 9.8 acres, located in Duval County, Florida known as Southern Grove.

d. Four parcels of real property, totalling approximately 16 acres, located in Duval County, Florida, known as River Creek.

e. Two parcels of real property, approximately 10.5 acres and 2.2 acres, located in St. Johns County, Florida, known as Beach Harbour.

f. One parcel of real property, approximately 10 acres, located in St. Johns County, Florida, known as Players Place or The View.

g. One parcel of real property, approximately 39 acres, located in St. Johns County, Florida, known as Islands of San Sebastian.

h. One parcel of real property, approximately 285 acres, located in St. Johns County, Florida, known as Flagler Landing or Stokes Landing.

i. Three parcels of real property, totalling approximately 38 acres, located in Duval County, Florida, known as Belle Rive or L'Hermitage.

j. One parcel of real property, approximately 117 acres, located in Duval County, Florida, known as Reddie Point.

7. THOMAS C. TURNER was a Jacksonville attorney who handled the closings of various real properties purchased by ELLIS E. NEDER, JR., his corporations, and partnerships. THOMAS C. TURNER was also an agent for various title insurance companies that provided title insurance in the various real estate transactions involving ELLIS E. NEDER, JR. THOMAS C. TURNER was also the developer

of real property in St. Johns County, Florida known as Mallard Landing and obtained land acquisition and land development financing through his relationship with ELLIS E. NEDER, JR.

8. TURNER AND FORD, P.A. was a law firm registered as a professional service corporation under the laws of the State of Florida and its President was THOMAS C. TURNER. Attorney fees and title insurance fees received from ELLIS E. NEDER, JR. were deposited into a bank account of TURNER AND FORD, P.A.

9. HORACE MARSH was the incorporator, director, and officer of many corporations that purchased real property on behalf of ELLIS E. NEDER, JR. and transferred the same real property to ELLIS E. NEDER, JR. or his partnerships at inflated prices. HORACE MARSH signed various purchase and sale contracts, warranty deeds, and loan settlement statements and authorized disbursement of loan proceed monies to ELLIS E. NEDER, JR. instead of the corporations.

10. STEVEN A MOORE was the president of Neder Properties, Inc. and assisted ELLIS E. NEDER, JR. in the development of various properties.

11. HARVEY M. MANSS was an architect licensed under the laws of the State of Florida and was the architect hired by NEDER for the Southern Grove and Reddie Point projects.

12. WILLIAM THOMAS FREEMAN, JR. was a contractor licensed under the laws of the State of Florida and was the construction manager for Management Constructors, Inc., which was the general contractor for the construction loan obtained from the United Brotherhood of Carpenters and Joiners of America for the Reddie Point project.

13. JANET S. KING was the marketing director for Neder Properties, Inc. and solicited purchase and sale contracts and reservation agreements for condominium projects developed by Neder Properties, Inc.

14. SANDRA McDANIEL was a realtor who assisted ELLIS E. NEDER, JR. in the acquisition and development of some real properties. McDANIEL solicited purchase and sale contracts and reservation agreements for condominium projects developed by ELLIS E. NEDER, JR.

15. MARY C. MILLIS was a realtor associate who assisted ELLIS E. NEDER, JR. in the acquisition of real properties. MILLIS also executed, in her maiden name, various corporation documents on behalf of ELLIS E. NEDER, JR.

16. MICHAEL J. ARINGTON was a Jacksonville attorney and an associate of ELLIS E. NEDER, JR. MICHAEL J. ARINGTON assisted ELLIS E. NEDER, JR. in the development of condominium projects and executed a reservation agreement and purchase and sale contract with deposit money provided by ELLIS E. NEDER, JR.

17. ROY F. SMITH, JR. was an appraiser, licensed by the State of Florida, who provided and certified inflated appraisals of properties known as Cedar Creek, River Creek, San Sebastian, The View, and L'Hermitage for ELLIS E. NEDER, JR. to submit to financial institutions and other lenders in support of land acquisition loan applications of ELLIS E. NEDER, JR. and his partnerships.

18. ROY F. SMITH, JR. AND ASSOCIATES, INC. was a real estate appraisal firm that was a corporation registered under the laws of the State of Florida. ROY F. SMITH, JR. was its president. The corporation received fees

from ELLIS E. NEDER, JR. for inflated appraisals performed by its employees or officers.

19. PETER A. FOGG was employed as a staff appraiser by ROY F. SMITH, JR. AND ASSOCIATES, INC. and produced the inflated appraisals for real properties known as Cedar Creek, River Creek, San Sebastian, The View, and L'Hermitage. PETER A. FOGG received 40% of the fees paid to ROY F. SMITH, JR. AND ASSOCIATES, INC. by ELLIS E. NEDER, JR. for the appraisals.

20. The following lenders loaned or agreed to loan sums of money to ELLIS E. NEDER, JR. or his partnerships:

a. Financial institutions whose accounts and deposits were insured by the Federal Deposit Insurance corporation:

1. Caribank, 848 Brickell Avenue, Miami, Florida.

2. Central Bank of the South, Birmingham, Alabama, hereinafter referred to as "Central Bank".

b. Financial institutions whose accounts and deposits were insured by the Federal Savings and Loan Insurance Corporation:

1. Jacksonville Federal Savings and Loan Association, Jacksonville, Florida, hereinafter referred to as "Jacksonville Federal S & L".

2. Duval Federal Savings and Loan Association, Jacksonville, Florida, hereinafter referred to as "Duval Federal S & L".

3. Amerifirst Federal Savings and Loan Association, Maitland, Florida, hereinafter referred to as "Amerifirst S & L".

4. Security First Federal Savings and Loan Association, 501 North Grandview Avenue, Daytona Beach, Florida, hereinafter referred to a "Security First S & L".

5. Financial Federal Savings and Loan Association, 6625 Miami Lakes Drive, Miami, Florida, hereinafter referred to as "Financial Federal S & L".

6. Baltimore Federal Savings, Baltimore, Maryland, hereinafter referred to as "Baltimore Federal".

7. Carteret Savings and Loan Association, F.A., 200 East Palmetto Park Road, Boca Raton, Florida, hereinafter referred to as "Carteret S & L".

c. Other lenders:

1. Greyhound Leasing & Financial Corporation, Phoenix, Arizona, hereinafter referred to as "Greyhound".

2. Bancsmiths Mortgage Corporation, 1307 U.S. 19 South, Clearwater, Florida, hereinafter referred to as "Bancsmiths".

3. United Brotherhood of Carpenters and Joiners of America, 101 Constitution Avenue, Washington, D.C., hereinafter referred to as the "Union".

B. CHARGE

From in or about May 1984, through in or about May 1988, at Jacksonville, in the Middle District of Florida, and elsewhere,

ELLIS E. NEDER
THOMAS C. TURNER
TURNER AND FORD, P.A.
HORACE MARSH
STEVEN A. MOORE
HARVEY M. MANSS
WILLIAM THOMAS FREEMAN, JR.
JANET S. KING
SANDRA McDANIEL
MARY C. MILLIS
MICHAEL J. ARINGTON
ROY F. SMITH, JR.
ROY F. SMITH, JR. & ASSOCIATES, INC.
PETER A. FOGG

the defendants herein, did knowingly and willfully conspire, combine, confederate and agree with each other, and with others known and unknown to the grand jury, to commit offenses against the United States, that is:

1. To execute and attempt to execute a scheme and artifice to defraud, and to obtain, by false and fraudulent pretenses, representations and promises, moneys owned by and under the custody and control of federally insured financial institutions, in violation of Title 18, United States Code, Section 1344.

2. To make materially false statements to federally insured financial institutions, in violation of Title 18, United States Code, Section 1014.

3. To transmit by means of wire communications in interstate commerce writings, signals, pictures, and sounds for the purpose of executing a scheme and artifice to defraud, and to obtain money by false and fraudulent pretenses, representations, and promises, in violation of Title 18, United States Code, Section 1343.

C. WAYS AND MEANS

The ways and means by which the conspiracy was carried out included the following:

I. LAND ACQUISITION FRAUD

1. It was part of the conspiracy that ELLIS E. NEDER, JR. would contract to purchase real property through a corporation at a specific price.

2. It was further part of the conspiracy that the defendants would cause to be executed a new purchase and sale agreement transferring the same real property from a corporation to ELLIS E. NEDER, JR. or his partnerships at an inflated purchase price.

3. It was further part of the conspiracy that the defendants would obtain an inflated appraisal on the real property and submit said appraisal to a lender to obtain a loan.

4. It was further part of the conspiracy that the purchase and sale agreement between the corporation and ELLIS E. NEDER, JR. would contain the false representation that ELLIS E. NEDER, JR. had placed a deposit of money for the purchase of the property with the corporation.

5. It was further part of the conspiracy that the defendants would submit the purchase and sale agreement between the corporation and ELLIS E. NEDER, JR. to a lender to obtain a land acquisition loan for said real property.

6. It was further part of the conspiracy that the defendants would conceal from the lender that ELLIS E. NEDER, JR. had contracted, through a corporation, to purchase the real property at a lower purchase price than represented to the lender.

7. It was further part of the conspiracy that the defendants would conceal from the lender that ELLIS E. NEDER, JR. had an interest in the corporation from which he was purchasing the real property.

8. It was further part of the conspiracy that THOMAS C. TURNER would act as the title agent, attorney for the seller and buyer, and attend all real estate transaction closings involving ELLIS E. NEDER, JR.

9. It was further part of the conspiracy that THOMAS C. TURNER would be an agent of a title insurance company which would provide title insurance for specific real estate transactions involving ELLIS E. NEDER, JR.

10. It was further part of the conspiracy that THOMAS C. TURNER, in violation of his title agency obligation, would not advise the title insurance company that the real estate transactions involved transfers of property from a corporation to an officer, director, or other insider of the corporation.

11. It was further part of the conspiracy that THOMAS C. TURNER would conceal from the lender that in the various real estate transactions he represented both the seller corporation, as its attorney, and the buyer, ELLIS E. NEDER, JR., or one of his partnerships, and further would not disclose that a relationship existed between the corporation and ELLIS E. NEDER, JR., or one of his partnerships.

12. It was further part of the conspiracy that the loan proceeds would be wired from the lender to the trust

account of THOMAS C. TURNER who would then disburse to ELLIS E. NEDER, JR. the portion of loan proceeds due and owing to the corporation.

13. It was further part of the conspiracy that the defendants would conceal from the lender that the loan proceeds that were to be provided to the corporation for the sale of the real property at closing of the real estate transaction were instead given by THOMAS C. TURNER to ELLIS E. NEDER, JR.

II. LAND DEVELOPMENT FRAUD

14. It was further part of the conspiracy that the defendants would submit applications to lenders to obtain land development loans for various parcels of real property.

15. It was further part of the conspiracy that the defendants would submit condominium reservation agreements to certain financial institutions as a condition of securing land development loans.

16. It was further part of the conspiracy that the defendants would cause individuals to sign condominium reservation agreements that contained false representations that the individuals had placed a $500 deposit with an escrow agent for the purchase of a condominium when in fact the $500 had not been so provided by the individuals.

17. It was further part of the conspiracy that the defendants would submit the condominium reservation agreements for the development at Southern Grove to a financial institution, falsely representing them to be agreements from bona fide purchasers who had each placed a $500 deposit with an escrow agent.

18. It was further part of the conspiracy that the defendants would submit to the financial institution some

condominium reservation agreements that contained forged signatures.

19. It was further part of the scheme and artifice that the defendants would fraudulently conceal from and not disclose to Security First Federal S & L that they had provided the $500 deposits for the individuals who had signed the "condominium reservation agreements".

20. It was further part of the conspiracy that the defendants would have individuals sign purchase and sale contracts for condominiums at his projects which contained false representations that the purchasers had deposited 10% of the purchase price at the time of the execution of the contracts with ELLIS E. NEDER, JR.

21. It was further part of the conspiracy that the defendants would submit said purchase and sale contracts to financial institutions for the purpose of obtaining financing on his projects and would fraudulently conceal from and not disclose to said financial institutions that he, rather than the alleged purchasers, had provided the 10% deposit for the purchase and sale contracts, and further concealed and did not disclose that certain of the alleged purchasers were not bona fide.

22. It was further part of the conspiracy that the defendants would create trust mortgage documents and utilize these documents as existing mortgages on real property to be paid by lenders who were providing the defendants land development loans.

III. CONSTRUCTION DRAW REQUESTS FRAUD

23. It was a part of the scheme and artifice that the defendants would submit and cause to be submitted to the Union to obtain construction loan proceeds for a project known as Reddie Point, false and fraudulent requisitions, draw

requests, and supporting documentation, which contained costs, expenses, and charges of vendors for projects other than Reddie Point and for work never performed.

24. It was further part of the scheme and artifice that ELLIS E. NEDER, JR. would sign a document entitled "form of Requisition" falsely certifying that the amount of expenses detailed were legitimate expenses incurred by the defendants on the Reddie Point project.

25. It was further part of the scheme and artifice that HARVEY M. MANNS, architect on the Reddie Point project, would approve the requisitions and draw requests, falsely certify that the itemized list of invoices and back-up data were in accordance with accepted standards of the architectural profession and reasonable, and submit said certification of the architect to the Union as part of the requisition and draw requests to obtain construction loan proceeds for the Reddie Point project.

26. It was further part of the scheme and artifice that WILLIAM THOMAS FREEMAN, JR., construction manager for the Reddie Point project, would sign and approve a Management Constructor's, Inc. "Construction Management Invoice" falsely detailing services and costs of vendors at the Reddie Point project for submission of said invoice to the Union as part of the requisitions and draw requests to obtain construction loan proceeds.

27. It was further part of the scheme and artifice that HARVEY M. MANSS would submit to the Union letters approving and recommending payment of draw requests of Management Constructor's, Inc.

28. It was further part of the scheme and artifice that STEVEN A. MOORE would solicit invoices from vendors who had performed services on other NEDER projects

and cause those invoices to be submitted to the Union as part of the draw requests for the Reddie Point project.

29. It was further part of the scheme and artifice that the defendants would receive construction loan proceeds via wire transmissions from an account of the Union in Indianapolis, Indiana, wired to the account of Reddie Point, Ltd. at Tucker State Bank of Jacksonville, Florida.

30. It was further part of the conspiracy that the defendants would utilize construction loan proceeds obtained from the Union, without the knowledge and authorization of the Union, to pay various fees in connection with land development loans from other lenders unconnected to the Reddie Point project.

IV. CONCEALMENT

31. It was further part of the conspiracy that the defendants would perform acts and make statements to hide and conceal, and cause to be hidden and concealed, the purpose of the conspiracy and the acts committed in furtherance thereof.

D. OVERT ACTS

In furtherance of this conspiracy, and to effect the objects thereof, the following overt acts, among others, were committed at Jacksonville in the Middle District of Florida, unless otherwise specified, and elsewhere:

1. On or about May 30, 1984, ELLIS E. NEDER, JR., through a partnership known as Rose Creek Associates, Limited, borrowed $102,000 from Jacksonville Federal S & L for land acquisition of property known as Rose Creek from JBA, Inc.

2. On or about May 30, 1984, HORACE MARSH authorized THOMAS C. TURNER to receive and accept the net proceeds check from the closing of the sale of

property from JBA, Inc. to NEDER and to execute closing documents.

3. On or about May 30, 1984, THOMAS C. TURNER signed, on behalf of JBA, Inc. a loan settlement statement relating to a $102,000 loan from Jacksonville Federal S & L to Rose Creek Associates, Limited, a partnership of ELLIS E. NEDER, JR., to purchase property from JBA, Inc.

4. On or about August 15, 1984, ELLIS E. NEDER, JR. signed a purchase and sale contract on behalf of JBA, Inc. purchasing approximately four acres of real property for the price of $177,000.

5. On or about August 16, 1984, ELLIS E. NEDER, JR. sent a letter to Duval Federal S & L representing that he had purchased the property described in overt act number 4 for the fair market price of $390,000 and that he had placed $97,500 down as a deposit on the purchase of the property.

6. On or about August 20, 1984, HORACE MARSH signed a $390,000 purchase and sale agreement as President of JBA, Inc. with ELLIS E. NEDER, JR. concerning approximately four acres of real property and falsely acknowledged receipt of $97,500 deposit from ELLIS E. NEDER, JR.

7. On or about August 25, 1984, ROY F. SMITH, JR. and PETER A. FOGG appraised the property described in overt act number 4 at $390,000, fair market value.

8. On or about August 30, 1984, ELLIS E. NEDER, JR. obtained a loan in the amount of $273,000 from the Duval Federal S & L of Jacksonville for land acquisition for the property described in overt act number 4 and received a bank cashier's check payable to JBA, Inc. for that amount.

9. On or about August 30, 1984, HORACE MARSH endorsed the $273,000 bank cashier's check from Duval Federal S & L payable to JBA, Inc. and provided the check to ELLIS E. NEDER, JR.

10. On or about August 30, 1984, ELLIS E. NEDER, JR. endorsed the $273,000 bank cashier's check from Duval Federal S & L payable to JBA, Inc., deposited it into his trust account, issued a $165,000 check to the original sellers of the property, and then retained $108,000.

11. On or about November 2, 1984, AMH, Inc. was incorporated in the State of Florida. HORACE MARSH was designated in the Articles of Incorporation as the director of the corporation.

12. On or about November 2, 1984, HORACE MARSH filed minutes of an Organizational Meeting of the Board of Directors of AMH, Inc., signed the minutes as Secretary of the corporation, and approved the minutes as Chairman. HORACE MARSH named himself President, Secretary, and Treasurer of the corporation and issued 100 shares of common stock of AMH, Inc. to himself.

13. On or about November 9, 1984, HORACE MARSH signed a purchase and sale contract on behalf of AMH, Inc. in the amount of $1,168,650 and agreed to transfer approximately 14.7 acres of real property in Duval County in the purchase and sale contract to ELLIS E. NEDER, JR. In the contract, HORACE MARSH falsely acknowledged receipt from ELLIS E. NEDER, JR. of $350,595 as a deposit for the purchase of the real property.

14. On or about November 26, 1984, ELLIS E. NEDER, JR. obtained an appraisal of the real property described in overt act number 15 which stated that the fair market value of the property was $1,175,000.

15. On or about December 12, 1984, ELLIS E. NEDER, JR. signed a purchase and sale agreement for the same property referred to in overt act number 13 on behalf of AMH, Inc. for the price of $514,500.

16. On or about January 15, 1985, Security First S & L loaned $822,500 to Southern Grove Limited, a partnership of ELLIS E. NEDER, JR., for the land acquisition of the property referred to in overt acts number 13 and 15.

17. On or about January 15, 1985, THOMAS C. TURNER, received the land acquisition loan proceeds from Security First S & L, and disbursed $303,534 of those loan proceeds to AMH, Inc. by providing a check, payable to the corporation, to ELLIS E. NEDER, JR., who endorsed and deposited the check into his personal bank account.

18. On or about January 15, 1985, THOMAS C. TURNER, issued a check from the loan proceeds of Security First S & L in the amount of $140,238 to ELLIS E. NEDER, JR. as a reimbursement for 40% of the deposit that NEDER falsely claimed he had placed down on the purchase of the property on November 9, 1984.

19. On or about January 15, 1985, HORACE MARSH signed a settlement statement on behalf of AMH, Inc. as the seller in the real estate transaction referred to in overt acts 13 through 18 acknowledging a loan from Security First S & L to a partnership of ELLIS E. NEDER, JR. of $822,500 which was utilized to purchase the property at the price of $1,168,650, receiving the balance from the loan proceeds on behalf of the corporation, and the issuance of monies as reimbursement of the deposit to ELLIS E. NEDER, JR.

20. On or about January 25, 1985, THOMAS C. TURNER sent a letter to ELLIS E. NEDER, JR. with documents attached to change officers and directors for AMH,

Inc. and First Prospector, Inc. In the letter, THOMAS C. TURNER requested that NEDER and MARSH execute the documents.

21. On or about March 14, 1985, ELLIS E. NEDER, JR. agreed to purchase four parcels of real property and signed purchase and sale agreements as a Vice President of a corporation known as First Prospector, Inc. The total purchase price of the contracts was $658,000.

22. On or about April 5, 1985, ROY F. SMITH, JR. and PETER A. FOGG appraised the property described in overt act number 21 at $1,780,000, fair market value.

23. On or about June 18, 1985, HORACE MARSH executed a warranty deed as President of First Prospector, Inc. transferring the property referred to in overt act 21 to River Creek Landing, Ltd., a partnership of ELLIS E. NEDER, JR. The documentary stamps affixed to the deed reflected a purchase price of $1,780,000.

24. On or about June 18, 1985, Baltimore Federal, Baltimore, Maryland wired $1,186,750 to the account of Bancsmiths Mortgage Corporation, Tampa, Florida, which wired monies to Jacksonville for THOMAS C. TURNER to disburse at the real estate closing of property known as River Creek.

25. On or about June 18, 1985, THOMAS C. TURNER issued a check in the amount of $432,689.68 payable to First Prospector, Inc. from the loan proceeds referred to in overt act number 24 and provided the corporate check to ELLIS E. NEDER, JR. who endorsed the check and deposited the check into his personal bank account.

26. On or about June 18, 1985, HORACE MARSH signed a settlement statement on behalf of First

Prospector, Inc. with respect to a real estate transaction for property known as River Creek and authorized THOMAS C. TURNER to pay all closing proceeds due to the corporate seller to ELLIS E. NEDER, JR.

27. On or about June 20, 1985, JANET S. KING signed the name of Dale Moehle to a "Deposit Receipt and Purchase and Sale Agreement" which falsely represented that Dale Moehle had agreed to purchase a condominium at a project known as Cedar Creek and had deposited $7,100 at the execution of the agreement, which agreement was submitted by ELLIS E. NEDER, JR. to AmeriFirst S & L.

28. On or about July 21, 1985, JANET S. KING provided to ELLIS E. NEDER, JR. for submission to Security First S & L a condominium reservation agreement in the name of John Para that falsely represented that John Para had deposited $500 with an escrow agent for the purchase of a condominium at a project known as Southern Grove.

29. On or about August 16, 1985, JANET S. KING provided to an appraiser who was preparing an appraisal of the development at Southern Grove which was to be submitted to Security First S & L a list of Southern Grove condominiums "sales to date" that included fictitious condominium sales and falsely stated $500 deposits had been made on the purchases of condominiums.

30. On or about September 6, 1985, JANET S. KING caused to be delivered to a representative of Security First S & L an appraisal conducted for the development of Southern Grove in support of a construction loan request of ELLIS E. NEDER, JR. in the amount of $5.4 million.

31. On or about April 7, 1986, JANET S. KING maintained at Neder Properties, Inc. a document entitled Southern Grove Reservations that recorded a list of

condominium reservations for the project known as Southern Grove and identified many of the reservations as "fake".

32. On or about July 1, 1985, at St. Johns County, Florida, ELLIS E. NEDER agreed to purchase approximately 9.7 acres of real property in St. Johns County for $600,000 and signed a purchase and sale agreement as President of First Frontier Corporation.

33. On or about August 1, 1985, HORACE MARSH signed a $1,500,000 purchase and sale agreement as president of First Frontier Corporation selling real property in St. Johns County to ELLIS E. NEDER, JR. and falsely acknowledged receipt in the agreement of $500,000 deposit from ELLIS E. NEDER, JR. for the purchase of that property.

34. On or about August 10, 1985, Earl B. Miller appraised the real property described in overt act number 32 at $1,500,000, fair market value.

35. On or about October 25, 1985, THOMAS C. TURNER sent a letter to the bona fide sellers of real property in St. Johns County described in overt act number 32 stating that his law firm represented First Frontier Corporation and requesting that they sign various legal documents.

36. On or about October 31, 1985, Caribank loaned $1,125,000 to Beach Harbour, Ltd., a partnership of ELLIS E. NEDER, JR., for the land acquisition of property referred to in overt act number 32. This money was wired to THOMAS C. TURNER as attorney for ELLIS E. NEDER, JR.

37. On or about October 31, 1985, THOMAS C. TURNER caused to be issued a check to TURNER AND FORD, P.A. in the amount of $29,000 from the Caribank loan proceeds for attorney fees.

38. On or about October 31, 1985, THOMAS C. TURNER, Esquire, issued a check to First Frontier Corporation in the amount of $347,646.45 representing monies due to the corporate seller from the loan proceeds of Caribank and TURNER provided this check to ELLIS E. NEDER, JR. who endorsed the check and deposited it into his personal bank account.

39. On or about October 31, 1985, at St. Augustine, Florida, THOMAS C. TURNER issued real estate broker checks to Sunshine Reality Corporation and Neder Properties, Inc. ELLIS E. NEDER, JR. provided the Neder Properties, Inc. check to MARY C. MILLIS and a check received by Neder from Sunshine Reality Corporation was given by NEDER to MARY C. MILLIS representing real estate fees for the sale of the property described in overt act 32.

40. On or about January 5, 1985, THOMAS C. TURNER signed, as a nominee for a partnership to be formed, a purchase and sale agreement for approximately 188 acres of real property for a purchase price of $1,750,000.

41. On or about January 26, 1985, THOMAS C. TURNER made application to Security First S & L requesting a joint venture agreement and a land acquisition loan for the real property described in overt act number 40.

42. During and between January 28, 1985 and March 27, 1985, THOMAS C. TURNER sought to obtain a developers fee up front from Security First S & L which the financial institution refused.

43. On or about March 26, 1985, THOMAS C. TURNER signed a partnership agreement entitled "Mallard Landing Associates, Ltd. along with JOHN EDGERTON and Michael Braren.

44. On or about March 27, 1985, Security First S & L loaned $1.1 million to THOMAS C. TURNER and his partnership for the acquisition of the land referred to in overt act number 40.

45. On or about March 27, 1985, a mortgage note in the amount of $200,000 between Mallard Landing Associates, Ltd. and Michael Braren was filed as a lien subordinate to the financial institution mortgage on the property referred to in overt act number 40.

46. During and between March 1985 and November, 1985, THOMAS C. TURNER had conversations with John Edgerton and Michael Braren in which they discussed a method to obtain money up front for TURNER, Edgerton and Braren in the development of property known as Mallard Landing.

47. In or about November, 1985, THOMAS C. TURNER made application to Caribank for a land development loan for Mallard Landing that would provide construction funds for Mallard Landing and pay off existing mortgages on the property.

48. On or about November 27, 1985, THOMAS C. TURNER received from Caribank a commitment to loan $2,658,000 to Mallard Landing Associates, Ltd. for land development of property known as Mallard Landing.

49. On or about December 2, 1985, THOMAS C. TURNER caused Michael Braren to execute an Assignment of Mortgage document that assigned to a trustee a $200,000 mortgage, which had been filed as a lien on the Mallard Landing property.

50. On or about December 2, 1985, Michael Braren provided THOMAS C. TURNER with an estoppel letter that was to be sent to Caribank that reflected the amount of the

$200,000 mortgage plus interest that included a forged signature of the trustee referred to in overt act number 49.

51. In or about December, 1985, Michael Braren provided THOMAS C. TURNER with a "Satisfaction of Mortgage" that represented the $200,000 mortgage had been paid in full and included a forged signature of the trustee referred to in overt act number 49.

52. On or about December 6, 1985, THOMAS C. TURNER provided the forged estoppel letter referred to in overt act number 50 to Caribank and advised Caribank that he possessed the Satisfaction of Mortgage which would be recorded once the mortgage was paid with part of the bank loan proceeds.

53. On or about December 10, 1985, Caribank loaned $2,658,000 to a partnership of THOMAS C. TURNER for the development of the real property known as Mallard Landing.

54. On or about December 11, 1985, THOMAS C. TURNER signed a Loan Closing Statement that falsely stated that he had disbursed $217,424.62 of the Caribank loan proceeds to the trustee referred to in overt act number 49.

55. On or about December 11, 1985, THOMAS C. TURNER sent to Caribank the Loan Closing Statement referred to in overt act number 54.

56. On or about December 11, 1985, THOMAS C. TURNER caused to be issued checks in the amount of $72,474.88 to himself, John Edgerton, and Michael Braren from the Caribank loan proceeds, totalling $217,424.62, which represented a "developer's fee" for TURNER, Edgerton, and Braren.

57. On or about December 20, 1985, THOMAS C. TURNER caused to be delivered a letter to Security First S & L falsely stating that Caribank loan proceeds were used to pay off the trustee referred to in overt act number 54 and enclosing with the letter a copy of the false Caribank Loan Settlement Statement signed by THOMAS C. TURNER.

58. On or about November 25, 1985, at St. Johns County, Florida, ELLIS E. NEDER, JR. signed a purchase and sale agreement for some real property in St. Johns County on behalf of First Frontier Corporation for the purchase price of $125,000.

59. On or about January 1, 1986, ELLIS E. NEDER, JR. signed a purchase and sale agreement for the same property described in overt act number 58 purchasing the property for $290,000 from the seller, AMH, Inc. The purchase and sale agreement included a forged signature of Mary Kerr as president of AMH, Inc.

60. On or about February 17, 1986, Caribank loaned $217,500 to Beach Harbour, Ltd., a partnership of ELLIS E. NEDER, JR. for the land acquisition of the real property described in overt act numbers 58 and 59. The money was wired by Caribank to the trust account of THOMAS C. TURNER.

61. On or about February 17, 1985, THOMAS C. TURNER disbursed from Caribank loan proceeds a check in the amount of $78,620.81 to AMH, Inc. and provided the check to ELLIS E. NEDER, JR.

62. On or about February 19, 1986, ELLIS E. NEDER, JR. sent a letter with an enclosed affidavit to an attorney representing Caribank which affidavit stated that NEDER did not share in any profits of AMH, Inc. The letter of NEDER stated that the affidavit was in response to the

conversation the attorney had with THOMAS C. TURNER. A copy of the letter and affidavit were sent to TURNER by NEDER.

63. On or about November 11, 1985, at St. Johns County, Florida, ELLIS E. NEDER, JR. signed a purchase and sale agreement as vice president of First Frontier Corporation to purchase property in St. Johns County for the price of $320,000.

64. On or about November 22, 1985, ROY F. SMITH, JR. and PETER A. FOGG appraised the property described in overt act number 63 at $1,570,000, fair market value.

65. On or about December 3, 1985, ELLIS E. NEDER, JR. signed a purchase and sale agreement for the property described in overt act number 63 for $1,525,000 from Islands of San Sebastian, Inc. The contract was also signed on behalf of the corporation by MARY C. MILLIS who used the name "M. C. Rozier", and falsely acknowledged that she had received $400,000 deposit from ELLIS E. NEDER, JR.

66. On or about December 17, 1985, ELLIS E. NEDER, JR. caused a memorandum to be sent to THOMAS C. TURNER requesting that TURNER create a corporation known as Islands of San Sebastian, Inc. "with M.C. Rozier to sign all documents".

67. On or about December 19, 1985, THOMAS C. TURNER caused the articles of incorporation for Islands of San Sebastian, Inc. to be sent to the Secretary of State of the State of Florida; the articles of incorporation were signed by MARY C. MILLIS, who signed the articles using the name "M. C. Rozier".

68. On or about January 10, 1986, THOMAS C. TURNER notarized the signature of "M. C. Rozier"

executed by MARY C. MILLIS as president of Islands of San Sebastian, Inc. on a warranty deed transferring real property between Islands of San Sebastian, Inc. and Islands of San Sebastian, Ltd., a partnership of ELLIS E. NEDER, JR.

69. On or about January 10, 1986, THOMAS C. TURNER notarized an owners affidavit provided by MARY C. MILLIS who signed the affidavit "M. C. Rozier" as president of Islands of San Sebastian, Inc.

70. On or about January 10, 1986, Caribank loaned $1,177,500 to Islands of San Sebastian, Ltd., a partnership of ELLIS E. NEDER, JR., for the land acquisition referred to in overt acts number 63 and 65 and wired this money to the trust account of THOMAS C. TURNER.

71. On or about January 10, 1986, THOMAS C. TURNER disbursed a check totaling $706,964.66 from the Caribank loan proceeds, made the check payable to Islands of San Sebastian, Inc. and provided the check to ELLIS E. NEDER, JR. who endorsed the check and deposited it into his personal bank account.

72. On or about January 10, 1986, ELLIS E. NEDER, JR. submitted an affidavit to Caribank stating that he was not affiliated with the Islands of San Sebastian, Inc. from whom he had purchased the real property that formed the basis of the land acquisition loan from Caribank.

73. On or about January 10, 1986, THOMAS C. TURNER disbursed a $16,000 check from the Caribank loan proceeds made payable to Neder Properties, Inc. which check was given by ELLIS E. NEDER, JR. to MARY C. MILLIS a/k/a M. C. Rozier.

74. On or about January 17, 1986, MARY C. MILLIS cashed a $16,000 Neder Properties, Inc. check and obtained three $5,000 cashier's checks made payable to herself

and opened up a checking account in her own name with the remaining $1,000 cash.

75. On or about January 10, 1986, THOMAS C. TURNER caused to be issued a check made payable to TURNER AND FORD, P.A. in the amount of $8,000 from the Caribank loan proceeds for attorney's fees for THOMAS C. TURNER.

76. On or about November 8, 1985, at St. Johns County, Florida, ELLIS E. NEDER, JR. agreed to purchase some real property in St. Johns County on behalf of First Frontier Corporation, and signed the $540,060 purchase and sale agreement as President of First Frontier Corporation.

77. On or about December 2, 1985, HORACE MARSH signed a purchase and sale agreement for the same real property described in overt act number 76 for the amount of $1,130,000. HORACE MARSH signed the contract as president and falsely acknowledged in the contract receipt of a $282,500 deposit from ELLIS E. NEDER, JR.

78. On or about December 13, 1985, ROY F. SMITH, JR. and PETER A. FOGG appraised the real property described in overt act number 76 at $1,130,000, fair market value.

79. On or about January 24, 1986, Carteret S & L loaned $847,500 to Players Place, Ltd., a partnership of ELLIS E. NEDER, JR., for the land acquisition of the property described in overt act number 76. This money was wired to the trust account of THOMAS C. TURNER.

80. On or about January 24, 1986, THOMAS C. TURNER issued a check from the Carteret S & L loan proceeds in the amount of $242,412.53 made payable to First Frontier Corporation and provided the check to ELLIS E.

NEDER, JR. who endorsed the check and deposited it into his personal account.

81. On or about February 6, 1986, at St. Johns County, Florida, ELLIS E. NEDER, JR. signed a purchase and sale contract for real property in St. Johns County on behalf of First Frontier Corporation for a purchase price of $1,054,500.

82. On or about February 10, 1986, HORACE MARSH signed a $3,135,000 purchase and sale contract as President of T.A.E., Inc. for the real property described in overt act number 81 and falsely acknowledged receipt of a deposit of $783,500 from ELLIS E. NEDER, JR. for the purchase of that property.

83. On or about April 1, 1986, Earl B. Miller appraised the property described in overt act number 81 at $3,142,000, fair market value.

84. On or about April 21, 1986, ELLIS E. NEDER, JR. signed an assignment of a purchase and sale contract as vice president of First Frontier Corporation which assigned the purchase and sale contract described in overt act number 81 to TEAE, Inc.

85. On or about April 21, 1986, THOMAS C. TURNER notarized the signature of ELLIS E. NEDER, JR. as the vice president of First Frontier Corporation in an assignment of the purchase and sale agreement to T.E.A.E., Inc. referred to in overt act number 84.

86. On or about April 24, 1986, TEAE, Inc. was incorporated with the State of Florida. HORACE MARSH was the incorporator, the initial director, and the initial registered agent of TEAE, Inc.

87. On or about April 24, 1986, HORACE MARSH issued 1000 shares of TEAE, Inc. common stock to himself.

88. On or about April 29, 1986, Caribank loaned $2,350,000 to Stokes Landing, Ltd., a partnership of ELLIS E. NEDER, JR., for the land acquisition described in overt acts number 81 and 82.

89. On or about April 29, 1986, THOMAS C. TURNER made revisions to an affidavit of ELLIS E. NEDER, JR. that was to be submitted to Caribank in which NEDER stated he had no ownership interest in TEAE, Inc. nor did he share in any profits of the corporation.

90. On or about April 29, 1986, ELLIS E. NEDER, JR. submitted an affidavit to Caribank swearing that he had no ownership control in TEAE, Inc. nor did he share in any profits of the corporation.

91. On or about April 29, 1986, Caribank wired $2,350,000 loan proceeds to THOMAS C. TURNER who disbursed $905,026.25 in the form of a check from the loan proceeds to TEAE, Inc. TURNER provided the check to ELLIS E. NEDER, JR. who endorsed it and deposited it into his personal account.

92. On or about May 2, 1986, THOMAS C. TURNER caused to be issued a check in the amount of $21,000 payable to TURNER AND FORD, P.A. from the proceeds of the Caribank loan for attorney's fees for TURNER.

93. On or about June 13, 1986, ELLIS E. NEDER, JR. signed two purchase and sale contracts as president of First Prospector, Inc. for real property in Duval County. The purchase price amounts of the contracts were $816,000 and $1,135,000.

94. On or about June 16, 1986, HORACE MARSH signed a $4,083,600 purchase and sale contract as president of RBB, Inc. selling the real property described in overt act number 93 to a partnership of ELLIS E. NEDER, JR. and falsely acknowledged receipt of $1,020,900 deposit by ELLIS E. NEDER, JR. for the purchase of the real property.

95. On or about June 26, 1986, RBB, Inc. was incorporated with the State of Florida by the law firm of TURNER AND FORD, P.A. HORACE MARSH was the incorporator, the initial director, and the initial registered agent for the corporation.

96. On or about August 20, 1986, THOMAS C. TURNER sent a letter to an attorney representing the seller in the real estate transaction described in overt act number 93 with an attachment consisting of an Assignment of Contracts and Documents signed by ELLIS E. NEDER, JR. as president of First Prospector, Inc. assigning the purchase and sale agreement rights to RBB, Inc.

97. On or about November 12, 1986, THOMAS C. TURNER caused to be drafted a Warranty Deed conveying two easements from Gorham Associates, Ltd. to Southern Grove, Ltd.

98. On or about November 12, 1986, ELLIS E. NEDER, JR. requested Richard M. Romano to sign the Warranty Deed described in overt act number 97 even though Neder was advised by Romano that he (Romano) had no authority to execute any documents on behalf of Gorham Associates, Ltd.

99. In or about November 1986, at a meeting among ELLIS E. NEDER, JR., HARVEY M. MANSS, and other individuals concerning the project known as Southern Grove, HARVEY M. MANSS told an attorney who was

concerned about an invalid conveyance of property as an easement to Southern Grove, Ltd. not to say something he would regret.

100. In or about November 1986, THOMAS C. TURNER was advised that Richard Romano lacked the capacity to execute the deed referred to in overt act number 97 and that the signature would be invalid.

101. On or about November 12, 1986, THOMAS C. TURNER caused the deed described in overt act number 97 to be filed with the Clerk of Duval County, Florida.

102. On or about May 7, 1987, THOMAS C. TURNER prepared a mortgage and witnessed the signature of ELLIS E. NEDER, JR. on a $317,263 mortgage in favor of Blosam Contractors relating to the Cedar Creek project.

103. On or about May 7, 1987, THOMAS C. TURNER caused to be filed with the St. Johns County Clerk the mortgage described in overt act number 102 as a lien on real property of a partnership of ELLIS E. NEDER, JR. located in St. Johns County.

104. On or about January 11, 1988, Linda Clary, secretary to THOMAS C. TURNER, sent a letter with an enclosed note and mortgage to ELLIS E. NEDER, JR. stating, "Tom had drafted (the documents) in accordance with his discussion with Ellis (Neder)".

105. On or about January 20, 1988, ELLIS E. NEDER, JR. signed a loan modification agreement with Amerifirst S & L that conditioned the loan modification upon additional payment of monies in the amount of $146,800.

106. On or about January 20, 1988, ELLIS E. NEDER, JR. provided a certified check in the amount of $146,800 to Amerifirst S & L, the source of which came from

loan proceeds of a land development loan obtained by NEDER from the UBCJA for property known as Reddie Point.

107. On or about January 11, 1988, THOMAS C. TURNER prepared a Promissory Note and Mortgage Deed in the amount of $280,000 payable to a trustee and sent these documents to ELLIS E. NEDER, JR. to be executed and filed as a lien on property known as The View in St. John's County. The trustee was unaware of the existence of these documents or any trust.

108. On or about January 21, 1988, ELLIS E. NEDER, JR., as President of The View, Inc., executed a Promissory Note in the amount of $280,000 payable to a trustee and a related Mortgage Deed payable to a trustee with the intent that the Mortgage and Promissory Note would be filed as a lien on property known as The View in St. John's County.

109. On or about January 31, 1988, ELLIS E. NEDER, JR., made application to the Central Bank for a land development loan in the amount of $4,700,000 for development of property known as The View in St. John's County and represented falsely that the property had been purchased for $1,130,000.

110. On or about March 11, 1988, ELLIS E. NEDER, JR. received a commitment letter from the Central Bank agreeing to loan $4,700,000 to The View, Inc. and ELLIS E. NEDER, Jr. for land development of property known as The View in St. John's County.

111. On or about March 16, 1988, ELLIS E. NEDER, JR. sent to a representative of the Central Bank a letter accepting the terms of the commitment letter issued by the Central Bank of the South, but conditioning his acceptance upon the financial institution disbursing, at the closing of the development loan, "$1,130,000 to retire the debt on the land."

112. On or about July 14, 1985, Ronald Oberdier, an attorney, signed a "Condominium Reservation Agreement" for a project known as Southern Grove that contained false representations that he had deposited $500 with an escrow agent towards the purchase of a condominium.

113. On or about July 14, 1985, ELLIS E. NEDER, JR. submitted or caused to be submitted to Security First S & L a "Condominium Reservation Agreement" in the name of Ronald Oberdier as a condition precedent to obtaining a $5,400,000 construction loan for the project known as Southern Grove.

114. On or about July 15, 1985, Herman Gradick, an architect, signed a "Condominium Reservation Agreement" for a project known as Southern Grove that falsely represented that he had deposited $500 with an escrow agent towards the purchase of a condominium.

115. On or about July 15, 1985, ELLIS E. NEDER, JR. submitted or caused to be submitted to Security First S & L a "Condominium Reservation Agreement" in the name of Herman Gradick as a condition precedent to obtaining a $5,400,000 construction loan for the project known as Southern Grove.

116. On or about July 19, 1985, Jerry W. McDaniel, a realtor associate, signed a "Condominium Reservation Agreement" for a project known as Southern Grove that falsely represented that he had deposited $500 with an escrow agent towards the purchase of a condominium.

117. On or about July 19, 1985, ELLIS E. NEDER, JR. submitted or caused to be submitted to Security First S & L a "Condominium Reservation Agreement" in the name of Jerry W. McDaniel as a condition precedent to

obtaining a $5,400,000 construction loan for the project known as Southern Grove.

118. On or about July 21, 1985, MICHAEL J. ARINGTON signed a "Condominium Reservation Agreement" for a project known as Southern Grove that falsely represented that he had deposited $500 with an escrow agent towards the purchase of a condominium.

119. On or about July 21, 1985, ELLIS E. NEDER, JR. submitted or caused to be submitted to Security First S & L a "Condominium Reservation Agreement" in the name of MICHAEL J. ARINGTON as a condition precedent to obtaining a $5,400,000 construction loan for the project known as Southern Grove.

120. On or about July 29, 1985, Christopher A. White, an attorney, signed a "Condominium Reservation Agreement" for a project known as Southern Grove that falsely represented that he had deposited $500 with an escrow agent towards the purchase of a condominium.

121. On or about July 29, 1985, ELLIS E. NEDER, JR. submitted or caused to be submitted to Security First S & L a "Condominium Reservation Agreement" in the name of Christopher A. White as a condition precedent to obtaining a $5,400,000 construction loan for the project known as Southern Grove.

122. On or about September 25, 1985, Janet Miller, a realtor associate, signed a "Condominium Reservation Agreement" for a project known as Southern Grove that falsely represented that she had deposited $500 with an escrow agent towards the purchase of a condominium.

123. On or about September 25, 1985, ELLIS E. NEDER, JR. submitted or caused to be submitted to Security First S & L a "Condominium Reservation Agreement" in the

name of Janet Miller as a condition precedent to obtaining a $5,400,000 construction loan for the project known as Southern Grove.

124. On or about October 11, 1985, Sylvia Sanders, a realtor associate, signed a "Condominium Reservation Agreement" for a project known as Southern Grove that falsely represented that she had deposited $500 with an escrow agent towards the purchase of a condominium.

125. On or about October 11, 1985, ELLIS E. NEDER, JR. submitted or caused to be submitted to Security First S & L a "Condominium Reservation Agreement" in the name of Sylvia Sanders as a condition precedent to obtaining a $5,400,000 construction loan for the project known as Southern Grove.

126. On or about October 15, 1985, Joseph E. Warren, an attorney, signed a "Condominium Reservation Agreement" for a project known as Southern Grove that falsely represented that he had deposited 4500 with an escrow agent towards the purchase of a condominium.

127. On or about October 15, 1985, ELLIS E. NEDER, JR. submitted or caused to be submitted to Security First S & L a "Condominium Reservation Agreement" in the name of Joseph E. Warren as a condition precedent to obtaining a $5,400,000 construction loan for the project known as Southern Grove.

128. On or about October 25, 1985, Donald T. Moses, an attorney, signed a "Condominium Reservation Agreement" for a project known as Southern Grove that falsely represented that he had deposited $500 with an escrow agent towards the purchase of a condominium.

129. On or about October 25, 1985, ELLIS E. NEDER, JR. submitted or caused to be submitted to Security

First S & L a "Condominium Reservation Agreement" in the name of Donald T. Moses as a condition precedent to obtaining a $5,400,000 construction loan for the project known as Southern Grove.

130. On or about October 25, 1985, Michael A. Ossi, an attorney, signed a "Condominium Reservation Agreement" for a project known as Southern Grove that falsely represented that he had deposited $500 with an escrow agent towards the purchase of a condominium.

131. On or about October 25, 1985, ELLIS E. NEDER, JR. submitted or caused to be submitted to Security First S & L a "Condominium Reservation Agreement" in the name of Michael A. Ossi as a condition precedent to obtaining a $5,400,000 construction loan for the project known as Southern Grove.

132. On or about October 25, 1985, Gene E. Porter, Jr., an attorney, signed a "Condominium Reservation Agreement" for a project known as Southern Grove that falsely represented that he had deposited $500 with an escrow agent towards the purchase of a condominium.

133. On or about October 25, 1985, ELLIS E. NEDER, JR. submitted or caused to be submitted to Security First S & L a "Condominium Reservation Agreement" in the name of Gene E. Porter, Jr. as a condition precedent to obtaining a $5,400,000 construction loan for the project known as Southern Grove.

134. On or about December 10, 1986, MICHAEL J. ARINGTON signed a "Deposit Receipt and Purchase and Sale Agreement" that falsely represented that he had paid a down payment of $7,990 to ELLIS E. NEDER, JR. at the execution of the agreement for the purchase of a condominium at a project known as Southern Grove.

135. On or about December 10, 1986, MICHAEL J. ARINGTON signed an agreement with ELLIS E. NEDER, JR. in which ARINGTON agreed to allow NEDER to utilize the name and credit of ARINGTON in exchange for the deposit on the purchase price of a condominium and in which ARINGTON agreed not to disclose the terms of the agreement to any third party.

136. On or about December 22, 1986, MICHAEL J. ARINGTON received from defendant ELLIS E. NEDER, JR. a check in the amount of $7,990 which MICHAEL J. ARINGTON deposited in an account at American National Bank.

137. On or about December 31, 1986, MICHAEL J. ARINGTON caused to be issued a cashiers check in the amount of $7,990 payable to Gerald Bettman, Esquire, escrow agent for ELLIS E. NEDER, JR. on the Southern Grove project.

138. In or about January, 1987 ELLIS E. NEDER, JR. advised a loan processor to alter the salary reported in the "Residential Loan Application" of MICHAEL J. ARINGTON so that ARINGTON would qualify to obtain financing on the purchase of a condominium at Southern Grove.

139. In or about February, 1987, ELLIS E. NEDER, JR. and MICHAEL J. ARINGTON submitted and caused to be submitted a "Residential Loan Application" to Security First S&L that contained false information concerning the monthly gross salary of ARINGTON.

140. On or about December 22, 1986, Vivian Taylor Moilanen signed a "Deposit Receipt and Purchase and Sale Agreement" that falsely represented that she had paid a down payment of $7,990 to ELLIS E. NEDER, JR. at the

execution of the agreement for the purchase of a condominium at a project known as Southern Grove.

141. On or about December 22, 1986, Vivian Taylor Moilanen signed an agreement with ELLIS E. NEDER, JR. in which Moilanen agreed to allow NEDER to utilize the name and credit of Moilanen in exchange for the deposit on the purchase price of a condominium and in which TAYLOR agreed not to disclose the terms of the agreement to any third party.

142. On or about December 22, 1986, Vivian Taylor Moilanen received from defendant ELLIS E. NEDER, JR. a check in the amount of $7,990 which Moilanen deposited in an account at American National Bank.

143. On or about March 12, 1987 Vivian Taylor Moilanen caused to be issued a cashiers check in the amount of $7,990 payable to Gerald Bettman, Esquire, escrow agent for ELLIS E. NEDER, JR. on the Southern Grove project.

144. On or about December 29, 1986, Howard L. Rundquist signed a "Deposit Receipt and Purchase and Sale Agreement" that falsely represented that he had paid a down payment of $7,990 to ELLIS E. NEDER, JR. at the execution of the agreement for the purchase of a condominium at a project known as Southern Grove.

145. On or about December 29, 1986, Howard L. Rundquist signed an agreement with ELLIS E. NEDER, JR. in which Rundquist agreed to allow NEDER to utilize the name and credit of Rundquist in exchange for the deposit on the purchase price of a condominium and in which Rundquist agreed not to disclose the terms of the agreement to any third party.

146. On or about December 30, 1986, Howard L. Rundquist received from defendant ELLIS E. NEDER, JR.

a check in the amount of $8,090 which Rundquist deposited in an account at American National Bank.

147. On or about March 12, 1987, Howard L. Rundquist caused to be issued a cashiers check in the amount of $7,990 payable to Gerald Bettman, Esquire, escrow agent for ELLIS E. NEDER, JR. on the Southern Grove project.

148. On or about January 25, 1987, STEVEN A. MOORE caused to be signed a "Deposit Receipt and Purchase and Sale Agreement" that falsely represented that Louis V. and Joyce C. Lourcey had paid a down payment of $7,990 to ELLIS E. NEDER, JR. at the execution of the agreement for the purchase of a condominium at a project known as Southern Grove.

149. On or about March 12, 1987, STEVEN A. MOORE received from defendant ELLIS E. NEDER, JR. a check in the amount of $8,390 in the name of Louis V. and Joyce C. Lourcey which was exchanged by MOORE for a cashier's check payable to an escrow agent at the Southern Grove project.

150. On or about March 12, 1987, STEVEN A. MOORE caused to be issued a cashiers check in the amount of $7,990 payable to Gerald Bettman, Esquire, escrow agent for ELLIS E. NEDER, JR. on the Southern Grove project.

151. On or about February 9, 1987, Christopher A. White signed a "Deposit Receipt and Purchase and Sale Agreement" that falsely represented that he had paid a down payment of $7,990 to ELLIS E. NEDER, JR. at the execution of the agreement for the purchase of a condominium at a project known as Southern Grove.

152. On or about February 5, 1987, Christopher A. White received from defendant ELLIS E. NEDER, JR. a

check in the amount of $8,040 which Christopher A. White deposited in an account at American National Bank.

153. On or about February 4, 1987, Christopher A. White caused to be issued a cashiers check in the amount of $7,990 payable to Gerald Bettman, Esquire, escrow agent for ELLIS E. NEDER, JR. on the Southern Grove project.

154. On or about February 9, 1987, STEVEN A. MOORE caused to be signed a "Deposit Receipt and Purchase and Sale Agreement" that falsely represented that John D. and Angela F. Seymour had paid a down payment of $8,390 to ELLIS E. NEDER, JR. at the execution of the agreement for the purchase of a condominium at a project known as Southern Grove.

155. On or about March 12, 1987, STEVEN A. MOORE received from defendant ELLIS E. NEDER, JR. a check in the amount of $7,990 in the name of John D. Seymour which was exchanged by MOORE for a cashier's check payable to an escrow agent at the Southern Grove project.

156. On or about March 12, 1987, STEVEN A. MOORE caused to be issued a cashiers check in the amount of $7,990 payable to Gerald Bettman, Esquire, escrow agent for ELLIS E. NEDER, JR. on the Southern Grove project.

157. During and between December 31, 1986 and March 12, 1987, ELLIS E. NEDER, JR. caused Gerald Bettman to send letters to Security First S & L stating that Bettman, an escrow agent, had received checks from purported purchasers as deposits for the purchase of condominiums at Southern Grove.

158. During and between January, 1987 and November, 1987, Gerald Bettman kept cashiers checks received from the purported purchasers referred to in overt act number

155 without depositing them in any bank account contrary to the requirements of Florida Statute 718.202.

159. On or about November 17, 1987 Gerald Bettman provided to defendant ELLIS E. NEDER, JR. the cashiers checks described in overt act number 156 to defendant ELLIS E. NEDER, JR., who deposited the checks totalling $80,700 in an account of his.

160. On or about April 15, 1987, HORACE MARSH failed to report on his 1986 U.S. Individual Income Tax Return, Form 1040, that he had received $33,648 as interest income in 1986 from ELLIS E. NEDER, JR.

161. On or about September 5, 1986, SANDRA McDANIEL received approximately $58,558 from land acquisition loan proceeds fraudulently obtained by ELLIS E. NEDER, JR. from Greyhound.

162. On or about July 29, 1987, HARVEY MANSS executed a Release of Lien on behalf of Sverdrup Corporation releasing the right of said corporation to file a lien against Reddie Point, Ltd. for labor and material furnished by Sverdrup Corporation upon payment of $50,000. The total amount of money owed to Sverdrup Corporation for architectural work completed at the Reddie Point project at that time was approximately $300,000.

163. On or about September 1, 1987, HARVEY MANSS caused a fraudulent invoice in the amount of $180,217 for architectural services to be submitted to the Union by ELLIS E. NEDER, JR. in support of a requisition for payment in the amount of $601,637.95.

164. On or about October 27, 1987, STEVEN A. MOORE requested a representative of Florida Floats to provide invoices in the amount of $60,000 and $50,000 as

advance billings for work to be performed at the Reddie Point project.

165. On or about October 27, 1987, HARVEY MANSS told a representative of Florida Floats to submit the invoices referred to in overt act number 164 even though Florida Floats had not performed any work relating to said invoices.

166. On or about October 29, 1987, ELLIS E. NEDER, JR., STEVEN A. MOORE, HARVEY MANSS, and WILLIAM THOMAS FREEMAN, JR. submitted the invoices referred to in overt act number 164 to the Union as support for part of a requisition to the Union to obtain $821,056.09 in construction loan proceeds.

167. In or about January, 1988, STEVEN A. MOORE contacted Doris Ray of Waverly J. Ray Associates, Inc. and advised her to submit an invoice billable to Reddie Point for amounts Waverly J. Ray Associates, Inc. was owed for survey work performed at various non-Reddie Point projects.

168. On or about January 6, 1988, WILLIAM THOMAS FREEMAN, JR. contacted Doris Ray of Waverly J. Ray Associates, Inc. and requested a fraudulent invoice letter in the amount of $10,000 for "Mobilization charge for horizontal control work".

169. On or about January 6, 1988, WILLIAM THOMAS FREEMAN, JR. caused the fraudulent invoice letter described in overt act number 168 to be submitted to the union in conjunction with a requisition to the Union to obtain $669,875.06 in construction loan proceeds.

170. On or about March 1, 1988, ELLIS E. NEDER, JR. and STEVEN A. MOORE requested a fraudulent $30,000 mobilization invoice from L.B.'s Lawn Care, Inc. and

directed the owners of said corporation what language and amount to be written on the invoice.

171. On or about March 1, 1988, ELLIS E. NEDER, JR., STEVEN A. MOORE, HARVEY MANSS, and WILLIAM THOMAS FREEMAN, JR. caused the fraudulent invoice described in overt act number 170 to be submitted to the Union as part of the requisition to the Union to obtain $804,594.50 in construction proceeds.

172. During and between December 30, 1984 and December 30, 1987, THOMAS C. TURNER obtained $226,224.55 in attorney's fees from loan proceeds received by ELLIS E. NEDER, JR. from various lenders.

173. During and between December 30, 1984 and December 30, 1987, THOMAS C. TURNER deposited into the account of TURNER AND FORD, P.A. title fees totalling $56,361.45 that had been obtained from loan proceeds received by ELLIS E. NEDER, JR. from various lenders.

174. On or about November 7, 1986, THOMAS C. TURNER caused to be recorded with the Clerk of Duval County a warranty deed transferring real property known as Reddie Point from Riverside Group, Inc. to Reddie Point Ltd., a partnership of ELLIS E. NEDER, JR., and caused documentary stamps to be affixed to the deed which reflected the sales price between the parties was $6,750,000 whereas NEDER had purchased the real property through First Frontier Corporation from the seller for approximately $3,900,000.

All in violation of Title 18, United States Code, Section 371.

COUNTS TWO THROUGH TWELVE

A. INTRODUCTION

Part A of Count One is realleged and incorporated by reference as if set forth fully herein.

B. SCHEME AND ARTIFICE

Beginning on or about January 15, 1985, and continuing to on or about April 29, 1986, at Jacksonville, in the Middle District of Florida, and elsewhere,

ELLIS E. NEDER
THOMAS C. TURNER
TURNER AND FORD, P.A.
HORACE MARSH
STEVEN A. MOORE
JANET S. KING
SANDRA McDANIEL
MARY C. MILLIS
MICHAEL J. ARINGTON
ROY F. SMITH, JR.
ROY F. SMITH, JR. & ASSOCIATES, INC.
PETER A. FOGG

the defendants herein, did knowingly and willfully devise and intend to devise a scheme and artifice to obtain money, funds, and credits owned by and under the custody and control of the financial institutions identified below, the deposits of each of which were then insured either by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation, by means of false and fraudulent pretenses, representations, and promises.

C. WAYS AND MEANS

The ways and means by which the scheme and artifice was carried out is as follows:

Part C, Section I, Land Acquisition Fraud, paragraphs one through thirteen, Section II, Land Development Fraud, paragraphs fourteen through twenty-two, and Section IV, Concealment, paragraph thirty-one, of Count One are realleged and incorporated by reference as if set forth fully herein.

D. EXECUTION OF SCHEME

On or about the dates set forth below at Jacksonville, in the Middle District of Florida, and elsewhere, the defendants set forth below, did knowingly and willfully execute and attempt to execute the scheme and artifice by submitting and causing to be submitted to the financial institutions described below the following documents:

1. Purchase and sale contracts, set forth below, for various parcels of real property that (a) falsely inflated the price ELLIS E. NEDER, JR., had actually paid, through the corporations, for the real property, and (b) falsely represented that ELLIS E. NEDER, JR. had placed a deposit of money with the corporate seller for the purchase of the property.

2. Affidavits, set forth below, that contained false representations to the financial institutions that ELLIS E. NEDER, JR. did not obtain any profits from the corporations that were selling various parcels of real property to ELLIS E. NEDER, JR.:

COUNT	DEFENDANTS	DATE	FINANCIAL INSTITUTION	DOCUMENT	AMOUNT OF LOAN
2	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A. HORACE MARSH	1/15/85	Security First S&L	Contract	$822,500
3	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A. STEVEN A. MOORE JANET S. KING SANDRA McDANIEL	6/28/95	Amerifirst S&L	Contract	$4,150,000
4	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A. HORACE MARSH	8/9/85	Financial Federal S&L	Contract	$525,000

5	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A. HORACE MARSH	10/31/85	Caribank	Contract	$1,125,000
6	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A. STEVEN A. MOORE JANET S. KING SANDRA McDANIEL MICHAEL J. ARINGTON	11/19/85	Security First S&L	Contract	$5,400,000

7	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A. MARY C. MILLIS ROY F. SMITH, JR. ROY F. SMITH, JR. & ASSOCIATES, INC. PETER A. FOGG	1/10/86	Caribank	Contract	$1,177,500
8	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A. HORACE MARSH ROY F. SMITH, JR. ROY F. SMITH, JR. & ASSOCIATES, INC. PETER A. FOGG	1/24/86	Carteret S&L	Contract	$847,500

9	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A. HORACE MARCH	2/17/86	Caribank	Contract	$217,500
10	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A.	2/19/86	Caribank	Affidavit	$217,500
11	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A. HORACE MARSH	4/29/86	Caribank	Contract	$2,350,000
12	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A.	4/29/86	Caribank	Affidavit	$2,350,000

In violation of Title 18, United States Code, Sections 1344 and 2.

COUNTS THIRTEEN THROUGH TWENTY

A. INTRODUCTION

Part A of Count One is realleged and incorporated by reference as set forth fully herein.

B. CHARGE

Between on or about August 25, 1984, and April 1, 1986, at Jacksonville, in the Middle District of Florida, the defendants, as listed below, did knowingly and willfully materially overvalue, caused to be overvalued, and aid and abet in the overvaluation of land by means of false and inflated appraisals, which were submitted to the federally insured financial institutions listed below, pertaining to the below described projects, with the intent to and for the purpose of influencing the actions of such financial institutions:

COUNT	DEFENDANTS	DATE	FINANCIAL INSTITUTION	PROJECT
13	ROY F. SMITH, JR. PETER A. FOGG ELLIS E. NEDER, JR. ROY F. SMITH & ASSOCIATES, INC.	8/25/94	Duval Federal S & L	Cedar Creek (Parcel 1)
14	ROY F. SMITH, JR. PETER A. FOGG ELLIS E. NEDER, JR. ROY F. SMITH & ASSOCIATES, INC.	9/11/84	Duval Federal S & L	Cedar Creek (Parcel 2)
15	ROY F. SMITH, JR. PETER A. FOGG ELLIS E. NEDER, JR. ROY F. SMITH & ASSOCIATES, INC.	4/5/85	Baltimore Federal	River Creek

16	ELLIS E. NEDER, JR.	8/10/85	Caribank	Beach Harbor I
17	ELLIS E. NEDER, JR.	8/10/85	Caribank	Beach Harbor II
18	ROY F. SMITH, JR. PETER A. FOGG ELLIS E. NEDER, JR. ROY F. SMITH & ASSOCIATES, INC.	11/22/85	Caribank	San Sebastian
19	ROY F. SMITH, JR. PETER A. FOGG ELLIS E. NEDER, JR. ROY F. SMITH & ASSOCIATES, INC.	12/13/85	Carteret S & L	The View
20	ELLIS E. NEDER, JR.	4/1/86	Caribank	Flagler Landing

In violation of Title 18, United States Code, Sections 1014 and 2.

COUNTS TWENTY-ONE THROUGH THIRTY

A. INTRODUCTION

Part A of Count One is realleged and incorporated by reference as set forth fully herein.

B. SCHEME

Between in or about August, 1984, and in or about April, 1986, at Jacksonville, in the Middle District of Florida, and elsewhere,

ELLIS E. NEDER
THOMAS C. TURNER
TURNER AND FORD, P.A.
HORACE MARSH
MARY C. MILLIS
ROY F. SMITH, JR.
ROY F. SMITH, JR. & ASSOCIATES, INC.
PETER A. FOGG

the defendants herein, knowingly and willfully devised and intended to devise a scheme and artifice to defraud and to obtain money and property from the financial institutions set forth below, by means of false and fraudulent pretenses, representations, and promises, well knowing that the pretenses, representations, and promises were false and fraudulent.

C. WAYS AND MEANS

The ways and means by which the scheme was carried out is as follows:

Part C, Section I, Land Acquisition Fraud, paragraphs one through thirteen, and Section IV, Concealment, paragraph thirty-one, of Count One are realleged and incorporated by reference as if set forth fully herein.

D. EXECUTION OF SCHEME

On or about the dates set forth below, at Jacksonville, in the Middle District of Florida, and elsewhere, the defendants, set forth below, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, did take and receive and cause to be taken and received, from the United States mails, commitment letters of financial institutions extending land acquisition loan offerings to ELLIS E. NEDER, JR., as set forth below:

COUNT	DEFENDANTS	DATE	FINANCIAL INSTITUTION	AMOUNT OF LOAN
21	ELLIS E. NEDER, JR. THOMAS C. TURNER HORACE MARSH ROY F. SMITH, JR. ROY F. SMITH, JR. & ASSOCIATES, INC. PETER A. FOGG	8/28/84	Duval Federal S & L	$ 273,000
22	ELLIS E. NEDER, JR. THOMAS C. TURNER HORACE MARSH ROY F. SMITH, JR. ROY F. SMITH, JR. & ASSOCIATES, INC. PETER A. FOGG	10/3/84	Duval Federal S & L	$ 68,000

23	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A. HORACE MARSH	12/24/84	Security First S & L	$ 822,500
24	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A. HORACE MARSH ROY F. SMITH, JR. ROY F. SMITH, JR. & ASSOCIATES, INC. PETER A. FOGG	6/5/85	Baltimore Federal	$ 1,186,750

25	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A. HORACE MARSH	7/19/85	Financial Federal S & L	$ 525,000
26	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A. HORACE MARSH	10/21/85	Caribank	$ 1,125,000

27	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A. MARY C. MILLIS ROY F. SMITH, JR. ROY F. SMITH, JR. & ASSOCIATES, INC. PETER A. FOGG	12/20/85	Caribank	$ 1,177,500
28	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A. HORACE MARSH ROY F. SMITH, JR. ROY F. SMITH, JR. & ASSOCIATES, INC. PETER A. FOGG	1/14/86	Carteret S & L	$ 847,500

29	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A. HORACE MARSH	2/1/86	Caribank	$ 217,500
30	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A. HORACE MARSH	4/25/86	Caribank	$ 2,350,000

In violation of Title 18, United States Code, Sections 1341 and 2.

COUNTS THIRTY-ONE THROUGH THIRTY-THREE

A. INTRODUCTION

Part A of Count One is realleged and incorporated by reference as if set forth fully herein.

B. SCHEME AND ARTIFICE

Between in or about March, 1985, and in or about November, 1986, at Jacksonville and Tampa, in the Middle District of Florida, and elsewhere

ELLIS E. NEDER
THOMAS C. TURNER
TURNER AND FORD, P.A.
HORACE MARSH
ROY F. SMITH, JR.
ROY F. SMITH, JR. & ASSOCIATES, INC.
PETER A. FOGG

the defendants herein, knowingly and willfully devised and intended to devise a scheme and artifice to defraud and to obtain money and property from the financial institutions or entities set forth below, by means of false and fraudulent pretenses, representations, and promises, well knowing that the pretenses, representations, and promises were false and fraudulent.

C. WAYS AND MEANS

The ways and means by which the scheme and artifice was carried out is as follows:

Part C, Section I, Land Acquisition Fraud, paragraphs one through thirteen, and Section IV, Concealment, paragraph thirty-one, of Count One are realleged and incorporated by reference as if set forth fully herein.

D. TRANSMISSIONS

On or about the dates listed below, at Jacksonville, in the Middle District of Florida, the defendants as described below, for the purpose of executing and attempting to execute the aforesaid scheme and artifice to defraud, did transmit and cause to be transmitted in interstate commerce by means of wire communications certain signs, signals, and sounds, that is, wire transfer, of monies described below:

COUNT	DEFENDANTS	DATE	WIRE TRANSFER TO/FROM	FINANCIAL INSTITUTION/ ENTITY	AMOUNT OF MONEY WIRED
31	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A. HORACE MARSH ROY F. SMITH, JR. ROY F. SMITH, JR. & ASSOCIATES, INC. PETER A. FOGG	6/18/85	Tampa, Florida Baltimore, Maryland	Baltimore Federal	$1,186,750

32	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A. HORACE MARSH ROY F. SMITH, JR. ROY F. SMITH, JR. & ASSOCIATES, INC. PETER A. FOGG	9/5/86	Jacksonville, Florida Phoenix, Arizona	Greyhound	$2,800,000
33	ELLIS E. NEDER, JR. THOMAS C. TURNER TURNER AND FORD, P.A. HORACE MARSH	11/7/86	Jacksonville, Florida Indianapolis, Indiana	Union	$5,720,000

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNTS THIRTY-FOUR AND THIRTY-FIVE

A. INTRODUCTION

Part A of Count One is realleged and incorporated by reference as if set forth fully herein.

B. SCHEME

Between in or about March, 1985, and in or about September, 1987, at Jacksonville, in the Middle District of Florida, and elsewhere,

ELLIS E. NEDER
THOMAS C. TURNER
TURNER AND FORD, P.A.
STEVEN A. MOORE
JANET S. KING
SANDRA McDANIEL
MICHAEL J. ARINGTON

the defendants herein, knowingly and willfully devised and intended to devise a scheme and artifice to defraud and to obtain money and property from the financial institutions set forth below, by means of false and fraudulent pretenses, representations, and promises, well knowing that the pretenses, representations, and promises were false and fraudulent.

C. WAYS AND MEANS

The ways and means by which the scheme and artifice was carried out is as follows:

Part C, Section II, Land Development Fraud, paragraphs fourteen through twenty-two, and Section IV, Concealment, paragraph thirty-one, of Count One are realleged and incorporated by reference as if set forth fully herein.

D. EXECUTION OF SCHEME

On or about the dates set forth below, at Jacksonville, in the Middle District of Florida, and elsewhere,

ELLIS E. NEDER, JR.
THOMAS C. TURNER
TURNER AND FORD, P.A.
STEVEN A. MOORE
JANET S. KING
SANDRA McDANIEL
MICHAEL J. ARINGTON

the defendants herein, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, did take and receive and cause to be taken and received commitment letters of financial institutions extending a loan offering to ELLIS E. NEDER, JR. from an authorized depository for mail matter delivered by the United States Postal Service as set forth below:

COUNT	DATE	FINANCIAL INSTITUTION	AMOUNT OF LOAN
34	3/28/85	Amerifirst S & L	$4,150,000
35	10/16/85	Security First S & L	$5,400,000

In violation of Title 18, United States Code, Sections 1341 and 2.

COUNTS THIRTY-SIX THROUGH FORTY-TWO

On or between June 18, 1985 and October 15, 1985, at Jacksonville, in the Middle District of Florida, the defendants set forth below, did knowingly and willfully make and cause to be made materially false statements in a document entitled "Deposit Receipt and Purchase and Sale Agreement", in the names of purported purchasers described below, that were submitted to the Amerifirst S & L as part of an

application by ELLIS E. NEDER, JR. to obtain a $4,150,000 construction loan for a project known as Cedar Creek, with intent to and for the purpose of influencing the action of the Amerifirst S & L, the deposits of which were then insured by the Federal Savings and Loan Insurance Corporation, in that each "Deposit Receipt and Purchase and Sale Agreement" contained false representations that the purported purchaser had paid the sum of money listed below to ELLIS E. NEDER, JR. at the execution of the agreement for the purchase of a condominium at Cedar Creek, whereas in truth and fact, as the defendants then well knew, the statements were false in that the purchaser did not deposit any money for the purchase of a condominium at Cedar Creek:

COUNT	DEFENDANT(S)	DATE	NAME OF PURCHASER IN AGREEMENT	AMOUNT OF MONEY REPRESENTED AS DOWN PAYMENT
36	ELLIS E. NEDER, JR.	6/18/85	Victor and Gerry Moreau	$ 7,750
37	ELLIS E. NEDER, JR. SANDRA McDANIEL	6/20/85	Sandra McDaniel	$ 8,900
38	ELLIS E. NEDER, JR.	6/20/85	Mary Kerr	$ 8,900
39	ELLIS E. NEDER, JR. JANET S. KING	6/20/85	Dale A. Moehle	$ 7,100
40	ELLIS E. NEDER, JR.	6/25/85	David B. Owen	$ 8,900
41	ELLIS E. NEDER, JR.	6/25/85	Jack Bettman	$ 8,900
42	ELLIS E. NEDER, JR.	10/15/85	Martha G. Fox	$ 3,995

In violation of Title 18, United States Code, Sections 1014 and 2.

COUNTS FORTY-THREE THROUGH SIXTY-ONE

Between on or about July 11, 1985, and October 25, 1985, at Jacksonville, in the Middle District of Florida, the defendants set forth below, did knowingly and willfully make and cause to be made materially false statements in a document entitled "Condominium Reservation Agreement", in the names of the purported buyers described below, that was submitted to Security First S & L as part of an application by ELLIS E. NEDER, JR. to obtain a $5,400,000 construction loan for a project known as Southern Grove, with intent to and for the purpose of influencing the action of Security First S & L, the deposits of which were then insured by the Federal Savings and Loan Insurance Corporation, in that each "Condominium Reservation Agreement" contained false representations that the purported buyer had deposited with and paid to an escrow agent $500 toward the purchase of a condominium at Southern Grove, whereas in truth and fact, as the defendants then well knew, the statements were false in that the buyers did not deposit $500 for the reservation of a condominium at Southern Grove:

COUNT	DEFENDANT(S)	DATE	NAME OF BUYER IN AGREEMENT	TOTAL PURCHASE PRICE
43	ELLIS E. NEDER, JR. JANET S. KING	7/11/85	John C. Para	$ 83,600
44	ELLIS E. NEDER, JR.	7/12/85	Frank Green	$ 83,600
45	ELLIS E. NEDER, JR.	7/14/85	Ronald Oberdier	$ 79,000
46	ELLIS E. NEDER, JR.	7/15/85	Herman Gradick	$ 83,600
47	ELLIS E. NEDER, JR.	7/15/85	David Owen	$ 98,900
48	ELLIS E. NEDER, JR. SANDRA McDANIEL	7/19/85	Jerry W. McDaniel	$ 89,900
49	ELLIS E. NEDER, JR.	7/21/85	Michael D. Loyd	$ 89,900

50	ELLIS E. NEDER, JR. MICHAEL J. ARINGTON	7/25/85	Michael and Teresa Arington	$ 69,900
51	ELLIS E. NEDER, JR.	7/29/85	Christopher A. White	$ 85,400
52	ELLIS E. NEDER, JR.	8/1/85	John W. Kerr	$ 83,600
53	ELLIS E. NEDER, JR.	8/1/85	J. Robert Pierce	$ 69,900
54	ELLIS E. NEDER, JR. SANDRA McDANIEL	9/25/85	Janet Miller	$ 84,900
55	ELLIS E. NEDER, JR. SANDRA McDANIEL	10/11/85	Sylvia Sanders	$ 79,000
56	ELLIS E. NEDER, JR. SANDRA McDANIEL	10/11/85	Cheryl Whisnant	$ 79,000
57	ELLIS E. NEDER, JR.	10/15/85	Warren K. Anderson	$ 79,900

58	ELLIS E. NEDER, JR.	10/15/85	Joseph E. Warren	$ 79,900
59	ELLIS E. NEDER, JR.	10/25/85	Donald Tony Moses	$ 84,900
60	ELLIS E. NEDER, JR.	10/25/85	Michael Aziz Ossi	$ 69,900
61	ELLIS E. NEDER, JR.	10/25/85	Gene E. Porter, Jr	$ 75,000

In violation of Title 18, United States Code, Sections 1014 and 2.

COUNTS SIXTY-TWO THROUGH SEVENTY-ONE

Between on or about December 10, 1986 and February 13, 1987, at Jacksonville, in the Middle District of Florida, the defendants set forth below, did knowingly and willfully make and cause to be made materially false statements in a "Deposit Receipt and Purchase and Sale Agreement", in the names of purported purchasers described below, that was submitted to the Security First S & L as part of an application by ELLIS E. NEDER, JR. to obtain a $5,400,000 construction loan for a project known as Southern Grove, with intent to and for the purpose of influencing the action of the Security First S & L, the deposits of which were then insured by the Federal Savings and Loan Insurance Corporation, in that each "Deposit Receipt and Purchase and Sale Agreement" contained false representations that the purported purchaser had paid the amount of money described below to ELLIS E. NEDER, JR. at the execution of the agreement for the purchase of a condominium at Southern Grove, whereas in truth and fact, as the defendants then well knew, the statements were false in that the purchaser did not deposit any money for the purchase of a condominium at Southern Grove:

COUNT	DEFENDANT(S)	DATE	NAME OF PURCHASER IN AGREEMENT	AMOUNT OF MONEY REPRESENTED AS DOWN PAYMENT
62	ELLIS E. NEDER, JR THOMAS C. TURNER MICHAEL J. ARINGTON	12/10/86	Michael J. Arington	$ 7,990
63	ELLIS E. NEDER, JR. THOMAS C. TURNER	12/22/86	Vivian W. Taylor	$ 7,990
64	ELLIS E. NEDER, JR. THOMAS C. TURNER	12/29/86	Howard L. Rundquist	$ 7,990
65	ELLIS E. NEDER, JR. STEVEN A. MOORE	1/25/87	Louis V. Lourcey Joyce C. Lourcey	$ 7,990
66	ELLIS E. NEDER, JR. THOMAS C. TURNER	1/26/87	Michael D. Loyd	$ 7,990

67	ELLIS E. NEDER, JR. STEVEN A. MOORE	2/9/87	Ramona E. Hoskins	$ 8,390
68	ELLIS E. NEDER, JR. STEVEN A. MOORE	2/9/87	John D. Seymour Angela F. Seymour	$ 8,390
69	ELLIS E. NEDER, JR. THOMAS C. TURNER	2/9/87	Christopher A. White	$ 7,990
70	ELLIS E. NEDER, JR. THOMAS C. TURNER	2/10/87	Craig & Sue Waters	$ 7,990
71	ELLIS E. NEDER, JR. THOMAS C. TURNER	2/13/87	Janet E. Davis	$ 7,990

In violation of Title 18, United States Code, Sections 1014 and 2.

COUNT SEVENTY-TWO

Between on or about December 31, 1986 and March 27, 1987, at Jacksonville, in the Middle District of Florida,

ELLIS E. NEDER, JR.
MICHAEL J. ARINGTON

the defendants herein, did knowingly and willfully make and caused to be made a materially false statement in a "Residential Loan Application" to Security First Federal Savings and Loan Association as part of an application by the defendant to obtain a mortgage loan to purchase a condominium at a project known as Southern Grove, with intent to and for the purpose of influencing the action of Security First Federal S&L, the deposits of which were then insured by the Federal Savings and Loan Insurance Corporation, in that MICHAEL J. ARINGTON represented in the "Residential Loan Application" that his gross monthly income (base employment income) was $3,083, whereas in truth and in fact, as MICHAEL J. ARINGTON then well knew, the statement was false in that his gross monthly income (base employment income) in the "Residential Loan Application" had been altered and inflated to $3,083 so the defendant would qualify for a loan from the financial institution.

In violation of Title 18, United States Code, Sections 1014 and 2.

COUNT SEVENTY-THREE

A. INTRODUCTION

Part A of Count One is realleged and incorporated by reference as if set forth fully herein.

B. SCHEME AND ARTIFICE

Beginning on or about January 5, 1985, and continuing to on or about December 11, 1985, at Jacksonville, in the Middle District of Florida, and elsewhere,

THOMAS C. TURNER
TURNER AND FORD, P.A.

the defendants herein, did knowingly and willfully devise and intend to devise a scheme and artifice to defraud and to obtain money, funds, and credits owned by and under the custody and control of Caribank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, by means of false and fraudulent pretenses, representations, and promises.

C. WAYS AND MEANS

1. It was part of said scheme and artifice that the defendants would cause to be filed a mortgage as a lien on real property that was the subject of a land development loan applied for by the defendants.

2. It was further part of said scheme and artifice that the defendants would create a trust to be utilized for the defendants to obtain monies from loan proceeds of a financial institution.

3. It was further part of said scheme and artifice that the defendants would conceal from and not disclose to the financial institution that the mortgage trust document had been created in order for the defendants to obtain monies from loan proceeds.

4. It was further part of said scheme and artifice that the defendants would make application to the financial institution for a land development loan and request that the land development loan be utilized to pay off existing mortgages on the subject property.

5. It was further part of said scheme and artifice that the defendants would assign a mortgage to a trustee and represent to the financial institution that loan proceeds would be paid to the trustee of the mortgage.

6. It was further part of the scheme and artifice that THOMAS C. TURNER would obtain the loan proceeds for land development from the financial institution and execute a Loan Settlement Statement containing false representations that he had disbursed a portion of the loan proceeds to the trustee of the existing mortgage on the real property.

7. It was further part of the scheme and artifice that THOMAS C. TURNER would issue checks to the partners of Mallard Landing Associates, Ltd., (TURNER, John Edgerton, Michael Braren) instead of issuing a check to the trustee as represented to the financial institution.

8. It was further part of the scheme and artifice that THOMAS C. TURNER would misrepresent and make false statements to the financial institution with respect to disbursement of the loan proceeds to the trustee of the existing mortgage.

9. It was further part of the scheme and artifice that the defendants would perform acts and make statements to hide and conceal, and cause to be hidden and concealed, the purpose of the conspiracy and the acts committed in furtherance thereof.

D. EXECUTION OF SCHEME

On or about December 11, 1985 at Jacksonville, in the Middle District of Florida, and elsewhere,

THOMAS C. TURNER
TURNER AND FORD, P.A.

the defendants herein, did knowingly and willfully execute and attempt to execute the scheme and artifice by submitting and causing to be submitted to Caribank a loan settlement statement reflecting that loan proceeds would be disbursed to a trustee of a mortgage on real property whereas the defendants disbursed the loan proceeds to themselves.

In violation of Title 18, United States Code, Sections 1344 and 2.

COUNT SEVENTY-FOUR

On or about December 11, 1985, at Jacksonville, in the Middle District of Florida,

THOMAS C. TURNER

the defendants herein, did knowingly and willfully make a materially false statement in a "Loan Settlement Statement", that was submitted to Caribank as part of an application by the defendants for a $2,658,000 development loan for a project known as Mallard Landing, with intent to and for the purpose of influencing the action of Caribank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, in that the defendants represented in the Loan Settlement Statement that $217,424.64 of the loan proceeds had been disbursed to a trustee for a mortgage on the property, whereas in truth and fact, as the defendants then well knew, the statement was false in that the proceeds were not disbursed to a trustee but instead individual checks were issued in the approximate amount of $72,474 to THOMAS C. TURNER, John Edgerton and Michael Braren.

In violation of Title 18, United States Code, Section 1014 and 2.

COUNT SEVENTY-FIVE

On or about December 6, 1985, at Jacksonville, in the Middle District of Florida,

THOMAS C. TURNER

the defendants herein, did knowingly and willfully make a materially false statement in an estoppel letter which was submitted by the defendants to an attorney for Caribank as part of an application to obtain a $2,658,000 development loan for a project known as Mallard Landing, with intent to and for the purpose of influencing the action of Caribank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, in that said estoppel letter was purportedly signed by Enrique Antonio Puente, purported trustee for a mortgage on the property, concerning the pay-off figure for an existing mortgage on the Mallard Landing property, whereas in truth and fact, as the defendants then well knew, the signature of Enrique Antonio Puente was false and forged.

In violation of Title 18, United States Code, Section 1014 and 2.

COUNT SEVENTY-SIX

On or about December 11, 1985, at Jacksonville, in the Middle District of Florida,

THOMAS C. TURNER

the defendants herein, did knowingly and willfully make a materially false statement in a Satisfaction of Mortgage document which was submitted to an attorney for Caribank as part of the requirements to close a $2,658,000 development loan for a project known as Mallard Landing, with intent to and for the purpose of influencing the action of Caribank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, in that said Satisfaction of Mortgage

was purportedly signed by Enrique Antonio Puente and said document submitted as a legitimate document to support the expenditure of loan proceeds for the payment of a mortgage, whereas in truth and fact, as the defendants then well knew, the document was false in that the signature of Enrique Antonio Puente on the Satisfaction of Mortgage document was false and forged.

In violation of Title 18, United States Code, Section 1014 and 2.

COUNT SEVENTY-SEVEN

A. INTRODUCTION

Part A of Count One is realleged and incorporated by reference as if set forth fully herein.

B. SCHEME AND ARTIFICE

Beginning in or about December, 1987, and continuing to on or about March 16, 1988, at Jacksonville, in the Middle District of Florida, and elsewhere,

ELLIS E. NEDER, JR.
THOMAS C. TURNER

the defendants herein, did knowingly and willfully devise and intend to devise a scheme and artifice to defraud and obtain money, funds, and credits owned by and under the custody and control of the Central Bank of the South, the deposits of which where then insured by the Federal Deposit Insurance Corporation, by means of false and fraudulent pretenses, representations, and promises.

C. WAYS AND MEANS

1. It was part of said scheme and artifice that the defendants would cause to be filed a fictitious mortgage as

a lien on real property that was the subject of a land development loan for which the defendants applied.

2. It was further part of said scheme and artifice that a fictitious promissory note and mortgage deed payable to a trustee would be created to be utilized by the defendants to obtain monies from loan proceeds of a financial institution.

3. It was further part of said scheme and artifice that the defendants would conceal and not disclose to the financial institution that the mortgage payable to a trustee had been created by the defendants to obtain additional monies from loan proceeds of a financial institution.

4. It was further part of said scheme and artifice that the defendants would make application to a financial institution for a land development loan and request that the land development loan be utilized to pay off all existing mortgages on the subject property including the fictitious mortgage created by the defendants.

5. It was further part of said scheme and artifice that the defendants would obtain a commitment letter from the financial institution for a land development loan and condition acceptance of the commitment upon the financial institution disbursing the loan proceeds to pay off existing mortgages on the subject property, including the fictitious mortgage created by the defendants.

6. It was further part of the scheme and artifice that the defendants would perform acts and make statements to hide and conceal, and cause to be hidden and concealed, the purpose of the conspiracy and the acts committed in furtherance thereof.

D. EXECUTION OF SCHEME

On or about March 16, 1988, at Jacksonville, in the Middle District of Florida, and elsewhere,

ELLIS E. NEDER, JR.
THOMAS C. TURNER

the defendants herein, did knowingly and willfully execute and attempt to execute the scheme and artifice by submitting and causing to be submitted to Central Bank of the South a letter conditioning acceptance of a $4,700,000 land development loan upon Central Bank of the South disbursing loan proceeds to pay off all existing mortgages on the property, which, in fact, included a fictitious promissory note and mortgage deed to a trustee in the amount of $280,000 which had been created by the defendants.

In violation of Title 18, United States Code, Sections 1344 and 2.

COUNTS SEVENTY-EIGHT THROUGH EIGHTY-FOUR

A. INTRODUCTION

Part A of Count One is realleged and incorporated by reference as if set forth fully herein.

B. SCHEME AND ARTIFICE

Beginning on or about September 1, 1987, and continuing to on or about March 1, 1988,

ELLIS E. NEDER, JR.
STEVEN A. MOORE
HARVEY M. MANSS
WILLIAM THOMAS FREEMAN, JR.

the defendants herein, knowingly and willfully devised and intended to devise a scheme and artifice to defraud and to

obtain money and property from the United Brotherhood of Carpenters and Joiners of America (hereinafter "Union"), by means of false and fraudulent pretenses, representations, and promises, well knowing that the pretenses, representations and promises were false and fraudulent.

C. WAYS AND MEANS

1. It was a part of the scheme and artifice that the defendants would submit and cause to be submitted to the Union to obtain construction loan proceeds for a project known as Reddie Point, false and fraudulent requisitions, draw requests, and supporting documentation which contained costs, expenses, and charges of vendors for projects other than Reddie Point and for work never performed.

2. It was further part of the scheme and artifice that ELLIS E. NEDER, JR. would sign a document entitled "form of Requisition" falsely certifying that the amount of expenses detailed were legitimate expenses incurred by the defendants on the Reddie Point project.

3. It was further part of the scheme and artifice that HARVEY M. MANNS, architect on the Reddie Point project, would approve the requisitions and draw requests, falsely certify that the itemized list of invoices and back-up data were in accordance with accepted standards of the architectural profession and reasonable, and submit said certification of the architect to the Union as part of the requisition and draw requests to obtain construction loan proceeds for the Reddie Point project.

4. It was further part of the scheme and artifice that WILLIAM THOMAS FREEMAN, JR., construction manager for the Reddie Point project, would sign and approve a Management Constructor's, Inc. "Construction Management Invoice" falsely detailing services and costs of

vendors at the Reddie Point project for submission of said invoice to the Union as part of the requisitions and draw requests to obtain construction loan proceeds.

5. It was further part of the scheme and artifice that HARVEY M. MANSS would submit to the Union letters approving and recommending payment of draw requests of Management Constructor's, Inc.

6. It was further part of the scheme and artifice that STEVEN A. MOORE would solicit invoices from vendors who had performed services on other NEDER projects and cause those invoices to be submitted to the Union as part of the draw requests for the Reddie Point project.

7. It was further part of the scheme and artifice that the defendants would receive construction loan proceeds via wire transmissions from a Union account in Indianapolis, Indiana, wired to the account of Reddie Point, Ltd. at Tucker State Bank of Jacksonville, Florida.

8. It was further part of the scheme and artifice that the defendants would perform acts and make statements to hide and conceal, and cause to be hidden and concealed, the purpose of the conspiracy and the acts committed in furtherance thereof.

D. TRANSMISSIONS

On or about the dates listed below, at Jacksonville, in the Middle District of Florida,

ELLIS E. NEDER, JR.
STEVEN A. MOORE
HARVEY M. MANSS
WILLIAM THOMAS FREEMAN, JR

the defendants herein, for the purpose of executing and attempting to execute the aforesaid scheme and artifice did

transmit and cause to be transmitted in interstate commerce, from an account of the Union in Indianapolis, Indiana to the account of Reddie Point, Ltd., in Jacksonville, Florida, by means of wire communications, certain signs, signals, and sounds, that is, the wire transfers of monies representing construction loan proceeds on the requisition/draw requests as described below:

COUNT	DATE	REQUISITION/ DRAW NUMBER	AMOUNT
78	9/10/87	#1	$601,637.95
79	10/2/87	#2	$946,677.35
80	11/12/87	#3	$821,056.09
81	12/18/87	#4	$889,402.00
82	1/21/88	#5	$669,875.00
83	2/17/88	#6	$729,781.00
84	3/17/88	#7	$804,595.50

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT EIGHTY-FIVE

1. On or about the 16th day of June, 1988, at Jacksonville, in the Middle District of Florida,

MARY C. MILLIS

defendant herein, having duly taken an oath before Frank M. Odom, a competent officer and person, that is, a Special Agent of the Department of the Treasury, Internal Revenue Service, during an investigation duly authorized by the Department of the Treasury, Internal Revenue Service, a case in which Title 26, United States Code, Section 7602 authorizes an oath to be administered, that she would testify truly, did knowingly, willfully, and contrary to said oath state material matter which she did not believe to be true, that is to say:

2. At the date and place aforesaid, the Department of the Treasury, Internal Revenue Service, was conducting an investigation into the acquisition of real property by ELLIS E. NEDER, JR. through various corporations and to determine if ELLIS E. NEDER, JR. had violated federal income tax laws. It was material to the aforesaid investigation to determine whether MARY C. MILLIS had ever heard of or represented Islands of San Sebastian, Inc., whether she was ever an officer or director of said corporation, or if she had ever signed any documents on behalf of the corporation for ELLIS E. NEDER, JR.

3. At the date and place aforesaid in paragraph 1, MARY C. MILLIS provided an affidavit to the special agent of the Internal Revenue Service, and then and there being under oath as aforesaid, testified falsely before the special agent with respect to the aforesaid material matter as follows:

> "I have never heard of or represented any company or corporation named 'Islands of San Sebastian Inc.' or 'San Sebastian LTD.' nor have I ever been an officer or director for them. If my name appears on any documents or records reflecting these companies, it was done so without my knowledge."

4. The aforesaid statements of MARY C. MILLIS, as she then and there well knew and believed, were false in that:

a. On December 3, 1985, the defendant, MARY C. MILLIS, signed a "Deposit Receipt and Purchase and Sale Agreement" as M. C. Rozier, President of Islands of San Sebastian Corp. agreeing to sell real property located in St. John's County to ELLIS E. NEDER, JR. for a purchase price of $1,125,000 falsely acknowledging receipt of $400,000 from ELLIS E. NEDER, JR.

b. On December 19, 1985, the defendant, MARY C. MILLIS, signed the Articles of Incorporation for said corporation using the name M. C. Rozier representing she was the sole director, subscriber (incorporator) and registered agent of the corporation. The defendant also signed a certificate acknowledging that she was the agent authorized to accept service of process within the State of Florida.

c. On January 10, 1986, the defendant, MARY C. MILLIS, signed a Warranty Deed, an owner's affidavit, and a Settlement Statement using the name M. C. Rozier, President of Islands of San Sebastian, Inc. to transfer real property to a partnership of ELLIS E. NEDER, JR.

All in violation of Title 18, United States Code, Section 1621.

COUNT EIGHTY-SIX

On or about December 4, 1987, at Jacksonville, in the Middle District of Florida,

ELLIS E. NEDER, JR.

the defendant herein, a resident of the Middle District of Florida, did knowingly and willfully make and subscribe a U.S. Individual Income Tax Return, Form 1040, for the calendar year 1985, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Director, Internal Revenue Service Center, at Atlanta, Georgia, which return the defendant did not believe to be true and correct as to every material matter, in that the said return reported a total income of $53,625 for said calendar year, whereas, as the defendant then well knew and believed, he had received additional income in the approximate amount of $1,361,361.79 and had not reported such income in his tax return.

In violation of Title 26, United States Code, Section 7206(1).

COUNT EIGHTY-SEVEN

On or about September 1, 1988, at Jacksonville, in the Middle District of Florida,

ELLIS E. NEDER, JR.

the defendant herein, a resident of the Middle District of Florida, did knowingly and willfully make and subscribe a U.S. Individual Income Tax Return, Form 1040, for the calendar year 1986 which was verified by a written declaration that it was made under the penalties of perjury and was filed with the

Director, Internal Revenue Service Center, at Atlanta, Georgia, which said return the defendant did not believe to be true and correct as to every material matter in that the said tax return reported total income of minus $980,377 for said calendar year, whereas, as the defendant then well knew and believed, he had received additional income in the amount of approximately $4,268,767.83 and had not reported such income in his tax return.

In violation of Title 26, United States Code, Section 7206(1).

COUNT EIGHTY-EIGHT

On or about April 15, 1987, at Jacksonville, in the Middle District of Florida,

HORACE MARSH

the defendant herein, a resident of the Middle District of Florida, did knowingly and willfully make and subscribe a joint U.S. Individual Income Tax Return, Form 1040, for the calendar year 1986 which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Director, Internal Revenue Service Center, at Atlanta, Georgia, which said return the defendant did not believe to be true and correct as to every material matter in that the said return reported a joint total income of $69,042.37 whereas, as the defendant then well knew and believed, additional income in the amount of approximately $33,648 had been received and had not been reported in said joint tax return.

In violation of Title 26, United States Code, Section 7206(1).

COUNT EIGHTY-NINE

A. INTRODUCTION

1. Part A of Count One is realleged and incorporated by reference as if set forth fully herein.

2. At all times material to this indictment, ELLIS E. NEDER, JR.; Neder Properties, Inc.; First Frontier, Inc.; JBA, Inc.; AMH, Inc.; First Prospector, Inc.; Islands of San Sebastian, Inc.; T.E.A.E., Inc.; RBB, Inc.; Pt. Reddie, Inc.; E.A.T. Investors Equity, Inc.; The View, Inc.; Management Constructors, Inc.; and Reddie Point, Ltd were associated in fact and constituted an enterprise as defined in Title 18, United States Code, Section 1961(4).

3. At all times material to this indictment, the enterprise conducted a scheme and artifice to defraud and obtain, by false and fraudulent pretenses, promises, and representations, monies from federally insured financial institutions and other lenders.

4. At all times material to this indictment, Neder Properties, Inc., registered under the laws of the State of Florida, was utilized by the enterprise to assist in the acquisition and development of real properties by means of fraudulent land acquisition and land development loans from lenders. Neder Properties, Inc. was administratively dissolved by the State of Florida on November 4, 1988.

5. At all times material to this indictment, the defendant, ELLIS E. NEDER, JR. made applications for fraudulent land acquisition and development loans from various lenders.

6. At all times material to this indictment, the defendant, THOMAS C. TURNER, was the attorney for the enterprise and assisted the enterprise in the drafting and creation

of various legal documents so that the enterprise could obtain land acquisition and land development financing.

7. At all times material to this indictment, the defendant, HORACE MARSH, was the incorporator, director, and officer of many corporations that purchased real property on behalf of the enterprise and transferred the same real property to the enterprise at inflated prices. Defendant HORACE MARSH executed various purchase and sale contracts, deeds, and loan settlement statements to assist the enterprise in fraudulently obtaining funds from lenders.

8. At all times material to this indictment, the defendant, STEVEN A. MOORE, was an officer of Neder Properties, Inc., a corporation created to assist the enterprise in the development of properties.

9. At all times material to the indictment, the defendant, HARVEY M. MANSS, was an architect for the enterprise and assisted the enterprise in obtaining monies from lenders due to his certifications of documents as an architect.

10. At all times material to this indictment, the defendant, JANET S. KING, was the marketing director for Neder Properties, Inc. and assisted the enterprise in obtaining fraudulent land development loans from lenders. KING received monies from the enterprise for her activities that assisted the enterprise until approximately July 1987.

11. At all times material to this indictment, the defendant, SANDRA McDANIEL, was a realtor who assisted the enterprise in obtaining fraudulent land development loans from lenders.

12. At all times material to this indictment, the defendant, ROY F. SMITH, JR. was an appraiser who would provide to the enterprise inflated appraisals of real property to assist the enterprise in obtaining fraudulent loans from lenders.

13. At all times material to this indictment, the defendant, ROY F. SMITH, JR. AND ASSOCIATES, INC., was a real estate appraisal firm which received fees from the enterprise for inflated appraisals performed by its officers and employees for the enterprise.

14. At all times material to this indictment, the defendant, PETER A. FOGG, was a staff appraiser for ROY F. SMITH, JR. AND ASSOCIATES, INC. who would produce inflated appraisals of real property to assist the enterprise in obtaining fraudulent loans from lenders.

15. At all times material to this indictment, the enterprise conducted business in the State of Florida through various corporations and individuals who would locate real property for acquisition and development. The enterprise would arrange to have a corporation receive a broker's commission upon the closing of the transfer of real property to a partnership of ELLIS E. NEDER, JR. and would obtain its fees from loan proceeds obtained from federally insured financial institutions and other lenders located inside and outside the State of Florida. Loan proceeds from lenders would be provided to the enterprise by interstate and intrastate wire transmissions. The enterprise would mail documents out of the State of Florida for signature and cause them to be returned to the State of Florida as part of various loan and real estate transactions. The enterprise would provide marketing advertisements for various development projects to potential purchasers outside the State of Florida. The enterprise would send correspondence and documents from Jacksonville in the State of Florida to locations outside the State of Florida in support of its attempts to obtain land acquisition and land development loans. Fraudulent documents in support of various loan requests were sent from the State of Florida to the states of Arizona, New York, and to Washington, D.C., and loan proceeds that were fraudulently obtained were

transmitted from outside the State of Florida to the enterprise in the State of Florida.

B. CHARGE

From in or about May, 1984 to in or about May, 1988, in the Middle District of Florida and elsewhere, the defendants

ELLIS E. NEDER
THOMAS C. TURNER
HORACE MARSH
STEVEN A. MOORE
ROY F. SMITH, JR.
ROY F. SMITH, JR. & ASSOCIATES, INC.
PETER A. FOGG

being persons employed by and associated with the enterprise described in paragraph A.2., above, which was engaged in and the activities of which affected interstate commerce, did unlawfully, knowingly, and willfully conduct and participate, directly and indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity consisting of violations of Title 18, United States Code, Section 1341 (mail fraud) and Title 18, United States Code, Section 1343 (wire fraud), as set forth below:

PATTERN OF RACKETEERING

RACKETEERING ACT	
1	Count 21 which is realleged and incorporated by reference as if fully set forth herein.
2	Count 22 which is realleged and incorporated by reference as if fully set forth herein.
3	Count 23 which is realleged and incorporated by reference as if fully set forth herein.
4(a)	Count 24 which is realleged and incorporated by reference as if fully set forth herein.
4(b)	Count 31 which is realleged and incorporated by reference as if fully set forth herein.
5	Count 25 which is realleged and incorporated by reference as if fully set forth herein.

6	Count 26 which is realleged and incorporated by reference as if fully set forth herein.
7	Count 27 which is realleged and incorporated by reference as if fully set forth herein.
8	Count 28 which is realleged and incorporated by reference as if fully set forth herein.
9	Count 29 which is realleged and incorporated by reference as if fully set forth herein.
10	Count 30 which is realleged and incorporated by reference as if fully set forth herein.
11	Count 32 which is realleged and incorporated by reference as if fully set forth herein.
12	Count 33 which is realleged and incorporated by reference as if fully set forth herein.

13	Count 34 which is realleged and incorporated by reference as if fully set forth herein.
14	Count 35 which is realleged and incorporated by reference as if fully set forth herein.
15(a)	Count 78 which is realleged and incorporated by reference as if fully set forth herein.
15(b)	Count 79 which is realleged and incorporated by reference as if fully set forth herein.
15(c)	Count 80 which is realleged and incorporated by reference as if fully set forth herein.
15(d)	Count 81 which is realleged and incorporated by reference as if full set forth herein.

15(e)	Count 82 which is realleged and incorporated by reference as if full set forth herein.
15(f)	Count 83 which is realleged and incorporated by reference as if full set forth herein.
15(g)	Count 84 which is realleged and incorporated by reference as if full set forth herein.

In violation of Title 18, United States Code, Sections 1962(c) and 2.

COUNT NINETY

1. The allegations contained in Part A, paragraphs one through fifteen of Count Eighty-Nine are realleged in this count and are incorporated by reference as if fully set forth herein.

2. From in or about May, 1984 to in or about May 1988, in the Middle District of Florida and elsewhere, the defendants,

ELLIS E. NEDER, JR.
THOMAS C. TURNER
HORACE MARSH
STEVEN A. MOORE
HARVEY M. MANSS
JANET S. KING
SANDRA McDANIEL
ROY F. SMITH, JR.
ROY F. SMITH, JR. & ASSOCIATES, INC.
PETER A. FOGG

being persons employed by and associated with the above-described enterprise, which was engaged in and the activities of which affected interstate and foreign commerce, unlawfully and willfully did combine, conspire, confederate, and agree with each other, and with persons known and unknown to the Grand Jury, to commit an offense against the United States, to wit: to violate Title 18, United States Code, Section 1962(c), that is, to conduct and participate, directly and indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity.

3. It was part of the conspiracy that the defendants and their co-conspirators would commit acts of racketeering activity consisting of Racketeering Acts Number 1

through 15 of Part B, of Count Eighty-Nine, which are realleged and incorporated by reference herein.

4. It was further part of the conspiracy that each defendant agreed that two or more acts of racketeering activity would be committed in the conduct of the affairs of the enterprise.

5. It was further part of the conspiracy that the defendants and other persons to grand jury known and unknown, did combine and confederate to establish, and did in fact establish, an enterprise for the purpose of fraudulently obtaining land acquisition, land development, and construction loans from various lenders and the submission of false and fraudulent documents and statements in support thereof. It was further part of the conspiracy that the defendants and others known and unknown to the grand jury, did knowingly and willfully confederate, affiliate, and associate with said enterprise for the purpose of effecting the criminal objectives thereof.

6. Part C, Section I, Land Acquisition Fraud, paragraphs one through thirteen, Section II, Land Development Fraud, paragraphs fourteen through twenty-two, Section III, Construction Draw Requests Fraud, paragraphs twenty-three through thirty, and Section IV, Concealment, paragraph thirty-one, of Count One are realleged and incorporated by reference as if set forth fully herein.

OVERT ACTS

In furtherance of the conspiracy and in order to effect the object thereof, the defendants and their co-conspirators committed and caused to be committed the following acts, among others:

Overt Acts number 1-174, as alleged in Part D of Count one, are realleged and incorporated by reference as if set forth fully herein.

All in violation of Title 18, United States Code, Section 1962(d).

FORFEITURE

A. The allegations of Counts Eighty-Nine and Ninety of this indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures pursuant to the provisions of Title 18, United States Code, Section 1963.

B. The defendants, ELLIS E. NEDER, JR., THOMAS C. TURNER, HORACE MARSH, STEVEN A. MOORE, HARVEY M. MANSS, JANET S. KING, SANDRA McDANIEL, ROY F. SMITH, JR., ROY F. SMITH, JR. & ASSOCIATES, INC., and PETER A. FOGG, have interests they acquired and maintained in violation of Title 18, United States Code, Section 1962, all of which interests, in whatever forms, wherever located, and in whatever names held, are therefore subject to forfeiture to the United States of America pursuant to Title 18, United States Code, Section 1963(a)(1).

C. The defendants, ELLIS E. NEDER, JR., THOMAS C. TURNER, HORACE MARSH, STEVEN A. MOORE, HARVEY M. MANSS, JANET S. KING, SANDRA McDANIEL, ROY F. SMITH, JR., ROY F. SMITH, JR. ASSOCIATES, INC., and PETER A. FOGG, have interests in, securities of, claims against, and property and contractual rights affording sources of influence over an enterprise, more particularly described in Part A, paragraph 2 of Count Eighty-Nine, which they established, operated, controlled, conducted, and participated in the conduct of, in violation of Title 18, United States Code, Section 1962, thereby making all such interests, securities, claims, and property and contractual rights, in whatever forms, wherever located, and in whatever names held, subject to forfeiture to the United States of America pursuant to Title 18, United States Code, Section 1963(a)(2).

D. The defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, HORACE MARSH, STEVEN A. MOORE, HARVEY M. MANSS, JANET S. KING, SANDRA McDANIEL, ROY F. SMITH, JR., ROY F. SMITH, JR. & ASSOCIATES, INC., and PETER A. FOGG, have property constituting and derived from proceeds which they obtained, directly and indirectly, from racketeering activity in violation of Title 18, United States Code, Section 1962, thereby making all such property, in whatever form, wherever located, and in whatever names held, subject to forfeiture to the United States of America pursuant to Title 18, United States Code, Section 1963(a)(3).

E. The interests subject to forfeiture to the United States of America pursuant to paragraphs A, B, C, and D above include, but are not limited to:

1. $273,000 obtained from Duval Federal S & L on August 30, 1984 is forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, HORACE MARSH, ROY F. SMITH, JR., ROY F. SMITH, JR. & ASSOCIATES, INC. and PETER A. FOGG.

2. $68,000 obtained from Duval Federal S & L on October 9, 1984 is forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, HORACE MARSH, ROY F. SMITH, JR., ROY F. SMITH, JR. & ASSOCIATES, INC. AND PETER A. FOGG.

3. $822,500 obtained from Security First S & L on January 15, 1985 is forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, and HORACE MARSH.

4. $140,238 obtained from Security First S & L on January 15, 1985 is forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, and HORACE MARSH.

5. $525,000 obtained from Financial Federal S & L of Dade County on August 9, 1985 is forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, and HORACE MARSH.

6. $1,186,750 obtained from Bancsmiths/Baltimore Federal on June 18, 1985 is forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, HORACE MARSH, ROY F. SMITH, JR., ROY F. SMITH, JR. & ASSOCIATES, INC. and PETER A. FOGG.

7. $1,125,000 obtained from Caribank on October 31, 1985 is forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, and HORACE MARSH.

8. $217,500 obtained from Caribank on February 17, 1986 is forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, and HORACE MARSH.

9. $847,500 obtained from Carteret S & L on January 24, 1986 is forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, HORACE MARSH, ROY F. SMITH, JR, ROY F. SMITH, JR. & ASSOCIATES, INC. and PETER A. FOGG.

10. $1,177,500 obtained from Caribank on January 10, 1986 is forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, ROY F.

SMITH, JR., ROY F. SMITH, JR. & ASSOCIATES, INC. and PETER A. FOGG.

11. $2,350,000 obtained from Caribank on April 29, 1986 is forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, and HORACE MARSH.

12. $3,000,000 obtained from Greyhound on September 5, 1986 is forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, HORACE MARSH, ROY F. SMITH, JR., ROY F. SMITH, JR. & ASSOCIATES, INC. and PETER A. FOGG.

13. $6,000,000 obtained from the Union on November 7, 1986 is forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, and HORACE MARSH.

14. $4,150,000 obtained from Amerifirst S & L during and between 1985 and 1988 is forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, STEVEN A. MOORE, JANET S. KING, and SANDRA McDANIEL.

15. $2,000,000 obtained from Security First S & L during and between 1985 and 1987 is forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, STEVEN A. MOORE, JANET S. KING, and SANDRA McDANIEL.

16. $2,200,000 obtained from the Union on July 30, 1987 is forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, HORACE MARSH, and HARVEY M. MANSS.

17. $601,637.95 obtained from the Union on September 10, 1987 is forfeitable from defendants ELLIS E. NEDER, JR., STEVEN A. MOORE and HARVEY A. MANSS.

18. $946,677.35 obtained from the Union on October 2, 1987 is forfeitable from defendants ELLIS E. NEDER, JR., STEVEN A. MOORE and HARVEY A. MANSS.

19. $821,056.09 obtained from the Union on November 12, 1987 is forfeitable from ELLIS E. NEDER, JR., STEVEN A. MOORE and HARVEY A. MANSS.

20. $889,402.00 obtained from the Union on December 18, 1987 is forfeitable from defendants ELLIS E. NEDER, JR., STEVEN A. MOORE and HARVEY A. MANSS.

21. $669,875.00 obtained from the Union on January 21, 1988 is forfeitable from defendants ELLIS E. NEDER, JR., STEVEN A. MOORE and HARVEY A. MANSS.

22. $729,781.00 obtained from the Union on February 17, 1988 is forfeitable from defendants ELLIS E. NEDER, JR., STEVEN A. MOORE and HARVEY A. MANSS.

23. $804,595.00 obtained from the Union on March 17, 1988 is forfeitable from defendants ELLIS E. NEDER, JR., STEVEN A. MOORE and HARVEY A. MANSS.

24. $29,163.28 in real estate fees paid to defendant SANDRA McDANIEL on June 18, 1985 from loan proceeds from Baltimore Federal/Bancsmiths is

forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, HORACE MARSH, SANDRA McDANIEL, ROY F. SMITH, JR., ROY F. SMITH, JR. & ASSOCIATES, INC., and PETER A. FOGG.

25. $58,558 in real estate fees paid to defendant SANDRA McDANIEL on September 5, 1986 from loan proceeds from Greyhound is forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, HORACE MARSH, SANDRA McDANIEL, ROY F. SMITH, JR., ROY F. SMITH, JR. & ASSOCIATES, INC., and PETER A. FOGG.

26. $12,461.40 in real estate fees paid to defendant MARY C. MILLIS on October 31, 1985 from loan proceeds from Caribank on the Beach Harbour I transaction is forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, and HORACE MARSH.

27. $13,846.00 in real estate fees paid to Neder Properties, Inc. and given on October 31, 1985 to defendant MARY C. MILLIS from loan proceeds from Caribank on the Beach Harbour I transaction is forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, and HORACE MARSH.

28. $7,500 in real estate fees paid to Neder Properties, Inc. on February 17, 1986 from loan proceeds from Caribank on the Beach Harbor II transaction is forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, and HORACE MARSH.

29. $16,000 in real estate fees paid to Neder Properties, Inc. and given to defendant MARY C. MILLIS on January 10, 1986 from the loan proceeds

from Caribank is forfeitable from defendants ELLIS E. NEDER, JR., THOMAS C. TURNER, ROY F. SMITH, JR., ROY F. SMITH, JR. & ASSOCIATES, INC. and PETER A. FOGG.

30. $52,725 in real estate fees paid to Neder Properties, Inc. from loan proceeds from Caribank is forfeitable from defendant ELLIS E. NEDER, JR.

31. $34,532.62 in real estate fees paid to Neder Properties, Inc. from loan proceeds from Caribank is forfeitable from defendant ELLIS E. NEDER, JR.

32. 1984 Porsche 944, vehicle identification number WP0AA0942EN457524, purchased by ELLIS E. NEDER, JR. with loan proceeds is forfeitable from defendant ELLIS E. NEDER, JR.

33. 1979 BMW, vehicle identification number 5448011, purchased by ELLIS E. NEDER, JR. with loan proceeds is forfeitable from defendant ELLIS E. NEDER, JR.

34. 1987 Jeep, vehicle identification number IJCNJ15U5HT178886, purchased by ELLIS E. NEDER, JR. with loan proceeds is forfeitable from defendant ELLIS E. NEDER, JR.

35. 1985 Porsche, vehicle identification number WP0AA0940FN455417, purchased by ELLIS E. NEDER, JR. with loan proceeds is forfeitable from defendant ELLIS E. NEDER, JR.

36. $33,648 defendant HORACE MARSH received from defendant ELLIS E. NEDER, JR. obtained from loan proceeds is forfeitable from defendant HORACE MARSH.

37. $3,764.25 worth of jewelry more particularly described as a Ladies Omega watch purchased by defendant ELLIS E. NEDER, JR. from loan proceeds on December 3, 1987 is forfeitable from defendant ELLIS E. NEDER, JR.

38. $2,045.00 worth of jewelry more particularly described as Dea and Sapp earrings, two music boxes and a Mont Blanc pen purchased by defendant ELLIS E. NEDER, JR. from loan proceeds on December 24, 1987 is forfeitable from defendant ELLIS E. NEDER, JR.

39. $80,060.01 worth of furniture and furnishings obtained by defendant ELLIS E. NEDER, JR. from loan proceeds during and between January 25, 1985 and July 13, 1987 is forfeitable from defendant ELLIS E. NEDER, JR.

40. $24,250 in appraisal fees paid to defendants ROY F. SMITH, JR. & ASSOCIATES, INC. by defendant ELLIS E. NEDER, JR. is forfeitable from defendants ROY F. SMITH, JR., ROY F. SMITH, JR. & ASSOCIATES, INC., and PETER A. FOGG.

A TRUE BILL

/s/ Jamise D. Perdue
FOREMAN

ROBERT W. GENZMAN
United States Attorney

/s/ Stephen M. Kunz
STEPHEN M. KUNZ, Deputy Managing
Assistant United States Attorney

/s/ Curtis Fallgatter
CURTIS S. FALLGATTER, Managing
Assistant United States Attorney

No. 91-175-CR-J-16

UNITED STATES DISTRICT COURT

MIDDLE *District of* FLORIDA
JACKSONVILLE *Division*

THE UNITED STATES OF AMERICA
vs.
ELLIS E. NEDER, JR.; THOMAS C. TURNER; TURNER AND FORD, P.A.; HORACE MARSH; STEVEN A. MOORE; HARVEY M. MANSS; WILLIAM THOMAS FREEMAN, JR.; JANET S. KING; SANDRA McDANIEL; MARY C. MILLIS; MICHAEL J. ARINGTON; ROY F. SMITH, JR.; ROY F. SMITH, JR. & ASSOCIATES, INC.; PETER A. FOGG

INDICTMENT

18 U.S.C.	371; 1344, 2; 1014, 2; 1341, 2; 1343, 2; 1621; 1962(c), 2; 1962 (d)
26 U.S.C.	7206(1)

A true bill

/s/ Jamise D. Perdue
Foreperson

Filed in open court this 23rd day of August A.D. 1991
/s/ Leslie E. Harney
Deputy Clerk

Bail, $

[DEFENDANT'S OPENING STATEMENT TO THE JURY]

[Transcript Volume 1]

[Tr. 84] MR. FALLIS: May it please the Court, Mr. Kunz, ladies and gentlemen of the jury.

Mr. Kunz in his opening statement told you what he thought this case was about. And he told you that this case was about one thing and one thing only, and that's greed. Well, ladies and gentlemen, we'll agree that the evidence will support that this case is about greed. But this case is about a couple of other things besides greed. It's about ambition, incompetence, and greed. However, the evidence will show that those three characteristics, ladies and gentlemen, were not monopolized by Ellis Neder. There was a lot of incompetence in this case.

You heard about lending institutions loan money. You heard about greed, ladies and gentlemen. It was an enormous amount of greed, the evidence will show, on the part of the alleged victims, the lending institutions in this case. And the incompetence is insurmountable. The ambition? Yes. A great deal of ambition, which you'll find out in the course of this trial is not a crime.

You heard a lot of talk about money being lost, money being exchanged. It almost sounds like a civil case. Make no mistake about this, ladies and gentlemen. This is not a civil case about money. This is a criminal case about liberty. Obviously, the case is about Ellis Neder.

[Tr. 85] Who is Ellis Neder? Ladies and gentlemen, you'll know Ellis Neder better than anyone else by the end of this trial. And I believe the evidence will support that. The important thing is who is Ellis Neder in 1984? Well, he was a local attorney, an attorney who practiced mostly personal injury law, not real estate law. He knew nothing about real estate, for

all practical purposes. He was also a forty-year-old man who had a successful practice, a very reputable attorney. Represented some very, very important insurance firms as a defense lawyer.

However, he had reached a point in his life, like many people do, that he was tired. He had done what he's been doing for a number of years, and he had been successful at it. He had a net worth of slightly over a million dollars at that time, and never had any problems.

However, he himself was tired. Some people would say it was the mid-life crisis. Some would say it's burn-out. It doesn't matter. He wanted a change in his life. He had recently been divorced, which also made his life a little more empty. Although he was technically given joint custody of his children, his children both lived with mom away from him, and he was alone.

Well, he was also a very ambitious man. And for ambitious people who are burnt out, just dropping out is not the way to go. They want to continue. They're [Tr. 86] driven. But to make their lives more enjoyable, they've got to find something that they find more enjoyable and work as hard as they have to. You'll hear testimony about that.

Well, what did Ellis Neder do? He would go home at night, realize there's a void in his life. He wanted to make some change, yet he had responsibilities. He'd put on the T.V., read newspapers, and sometimes watch these cable programs where some real estate person gets up there and tells you how you can make a fortune in real estate and how exciting it is. Some issue tapes, books, and "how to's," all very legitimate and legal things.

He would read *The Wall Street Journal*, *The New York Times*, saying, "This is 1984. The place to be right now is real

estate. It's exciting." More specifically, he read that the best real estate that you can possibly ever invest in as a developer or as a purchaser is waterfront. And it makes sense. There's only X amount of waterfront in the United States of America, be it ocean, be it river, be it lake. And all of that property, because it's such a limited resource, had an enormous amount of value or potential value, value that wasn't realized by the people who owned it. Some people, yes, were sitting on very valuable real estate, and they didn't know it, because they were close to the water.

[Tr. 87] Well, Mr. Neder said, "Water? I'm in Jacksonville, Florida. There's nothing but water around here. We've got the Intracoastal. We've got a river. We've got an ocean. Now, if I'm sitting on top of a good opportunity and I want to make a change in my life, I don't have to leave. This is where to go."

And he decided that this is what he was going to do. He was going to change his life, ease out of law -- but personal injury law again -- and go into real estate. Now, real estate to him wasn't anything that was so remote, because his dad was in real estate. Although Ellis Neder never was in business with his dad, but as a child his dad provided a pretty decent living for them.

And he says, "Well, you know, I did pick up a few tips, but mostly from selling." He said, "You know something? I'm probably a good salesman, too. I've been a successful trial lawyer. Sometimes people make that analogy. If you can do that, maybe I can sell, too." And he said, "I think that's what my potential is. That's what I'll do."

He took some courses. He heard about things called equity funding. New concepts. He heard about something which, ladies and gentlemen, is not a negative thing, as the evidence will show, called land flipping. Land flipping, ladies

and gentlemen, you will find, and we will [Tr. 88] have people come and testify, experts to tell you, is not illegal. It's in the textbooks. Go to UNF. Take a course is real estate. It's a perfectly acceptable method of dealing in real estate. All it means is that you found a piece of property that's worth more than the asking price, and you can turn around and sell that property at a fair market value, if you can support it with the proper appraisals, and you get a loan on it. It's absolutely nothing illegal about that.

The prosecutor made you believe that this was something clandestine, some kind of a con, some kind of a scam. But it's not. You will hear experts. Don't forget what the prosecutor told you in opening and what I tell you, for that matter, is not evidence. You'll get the evidence right from there (indicating) and you will evaluate it.

So what did Mr. Neder do? He said, "This is what I want to do." And he had limited sources at that time. And he said, "I remember reading this and reading that. Now what's the next step? Find myself a real estate . . ." -- he found a piece of property that he later named Rose Creek. It's on a creek. He didn't start out on the ocean, ladies and gentlemen. He started with a small project.

And he said, "I'll apply those principles that I've [Tr. 89] learned called land flipping. But just to make sure that this information is true, let me find a real estate lawyer so I know what I'm doing is proper. Not from some salesman on T.V. or something I real in a book or in a newspaper. Because who knows? Maybe the laws are different around the United States.

So he did that. He went to go see a man named Robert Ford. Robert Ford, as the evidence will tell you, was a partner of a man called Thomas Turner, a man who the government told you you'd be hearing some evidence about.

Well, the day he went to see Robert Ford, Robert Ford was too busy, and he saw Tom Turner instead. He said, "Tom, this is what I plan on doing. I found this piece of property. I know I can have it for a lot less than what I think it's worth and what the real estate people tell me it's worth. However, I haven't got all of the money to develop this. Can I have it appraised, and if it comes out to be more and my suspicions are true, can I form a nominee corporation to buy it?" And that again, ladies and gentlemen, is not illegal.

You'll hear testimony that Walt Disney did that all around Orlando. That's how he bought up Orlando before anybody realized it was being bought up by nominee corporations. He said, "Can I do that?" He said, "Yeah. Let me think about it."

[Tr. 90] He came back and he said, "You know, I think it can be done. But, you know, I know enough about the law..." -- now, whether he did or he didn't, only you'll judge. "However, maybe you need to talk to an accountant."

So Ellis Neder said, "Sure. I'd better talk to an accountant, too, because what good is it if I make a great buy and then I've got to pay taxes and give it all back to the government?"

Nothing illegal about that. And you'll hear testimony that tax avoidance is not illegal. Tax evasion is and not tax avoidance. People make millions of dollars consulting people on how to avoid taxes. Nothing immoral and nothing illegal about it.

So he went to Tom Brooks, an excellent, reputable certified public accountant. And he said, "Ellis, I'll tell you what. You can do what you're going to do. Form your nominee corporations. As a matter of fact, a case that just came out with this was tested by the IRS, and they say you can.

But whatever you do with those nominee corporations, whatever excess proceeds you get, don't deposit it into the nominee corporation accounts. Because then you will realize a tax. But if you just take that money and not activate that account and put it in your own account, you will not have to pay any taxes or realize any consequences until the project is finished after you start [Tr. 91] to sell the units. That's when you realize the tax."

And he explained to him, and I believe he'll explain to you, that it's much like -- and I cannot be as eloquent and as technical perhaps as the government in this matter, but I'll reduce the -- he told him something to the effect, "Look. It's the same thing as if you take a second mortgage on your house. I mean, you maybe owe 100,000 on your house. Your house is worth 200,000 and you take $50,000 extra. You can do whatever you want with that money. That's not a profit. You owe that money."

See, that's the difference. It's not a profit because that money is still owed. Profit is money that you've earned and you don't owe anything on it. You can do what you want with it. He said, "Fine."

So he went to his first closing. And that's exactly what he did. We're not going to sit here, ladies and gentlemen, and tell you that some of the things the government said happened didn't happen. Of course, they did. Don't forget, this is a criminal court, not a civil court. The government is going to have to prove to you that this happened with the criminal intent of defrauding. That's different. Much different. And that will come later on in the trial when the Judge gives you the instructions on the law.

However, there was no, absolutely no intent to [Tr. 92] defraud anybody. Now, there were some questionable calls. True, some of the lenders said to Mr. Neder's attorney, Mr.

Tom Turner, "we need certain affidavits to show that this transaction -- that Mr. Neder is not a corporate member of the nominee corporation that bought it and that sort of thing and that he didn't share in any of the profits of the corporation."

So what did Mr. Neder do? He goes to his ex-firm in good faith -- you'll learn about good faith, ladies and gentlemen, later on, too, which is a recognized criminal defense. He said, "Look. I'm getting a little scared now. Okay? I mean, I like the concept. You tell me it's okay. My accountant tells me to do it this way. However, what are we going to do here?"

He said, "Ellis, don't worry about it," he said. "That corporation didn't make any money, and you had somebody else who was the corporate head, either Mr. Marsh or someone else. So you can answer that honestly."

He says, "Are you sure?"

"Yes, I'm sure."

He followed his advice.

Now, I said there was some ambition. Certainly that's ambition.

Greed. Well, ladies and gentlemen, I think the evidence will show you an attorney who doesn't know what [Tr. 93] he's talking about -- okay? And I'm not referring to my client -- and takes a fee for bad advice is greedy. Yeah. There's greed here.

Incompetence at best; greed at worst. Was he incompetent? Yes. I told you, ladies and gentlemen, that there was no monopoly on the part of Ellis Neder during that time when it came to incompetence. Not his own incompetence but the incompetence of the people he hired. Not his CPA, because that was good advice. That of his lawyer. But there was an

enormous amount of incompetence and indifference on the part of the lenders. These people who are screaming "foul" today, ladies and gentlemen -- and it had to run through your mind as you were watching those numbers go through -- okay? -- were completely incompetent.

Let's talk about where they were coming from. They also had a change in their lives, a mid-life crisis. We're talking about savings and loan institutions in 1982 did nothing more than finance homes. They were not even permitted to be in the commercial market. That was the commercial banks, for the pros. What did they do? They lobbied congressmen, which I'm sure we're all aware of today. And they said, "Look. We want to get out there. We want a bigger piece of the pie. We want to be federally insured just like commercial banks." And they [Tr. 94] got to some senators and congressmen. And they said, "Sure. We can do that."

Well, we realize today with the testimony that that decision is costing the American taxpayers over $500 million because of that decision. Now, these S&Ls, because that's what they are, with the exception of two private lenders, that's where they came from. What did they have? They had people who lent residential property. There was a scurry to find some -- steal commercial people from here and people from here. And they found a lot of incompetent people. Now, who were the big commercial lenders giving up at the time? Their best? Of course not. They've got new competition now. They're giving up their worst.

And I'll suggest to you the evidence will show that these loan officers were probably the worst that S&Ls could have picked up at that time.

These people are charged with knowing what they're doing and guiding, not only the people they represent, but potential buyers. No. Their greed, their ambition, and their

incompetence led to the saga that will unfold in this courtroom over the next couple of months.

Of course, when they come in this courtroom, you're going to hear testimony, "Foul. No way. We were deceived." Ladies and gentlemen, you will be the judges [Tr. 95] of that. There's something, and you'll hear about it, called indifference. They weren't deceived. They didn't care. That's what the evidence will show. They're out there booking loans. They couldn't lose. The American taxpayer, as we found out today, was going to foot their mistakes. What did they care? The more loans they put on, the bigger raises they got. Mortgage brokers were getting commissions. Real estate is hot. Everything is going great. Okay?

A lot of mistakes, ladies and gentlemen, were made because of their incompetence and their greed. That's not necessarily a crime.

That's the background, ladies and gentlemen, of this case. You can't sit here and look at charts. You've got to put all of the evidence that unfolds into that background as to what was going on out there in the market.

As I told you, a lot of things happened that were beyond anybody's control. And one of the most important things that happened in the real estate market, and experts will tell you this, that in 1986 the same brilliant Congress who decided to give the S&Ls the power to go out and commit commercial suicide, passed what they call the 1986, quote, Tax, quote, Reform Act. And you will hear experts, ladies and gentlemen, and I'm sure even [Tr. 96] the alleged victims, tell you it was the worst thing that ever happened to this country economically. And we're still paying for it today.

Because what did that act do? It broke the real estate market, took the bottom out completely. That act started in

1987, coincidentally when all of this started to fall apart. Why? The witnesses will tell you. Because that market -- those professionals that are listed on this did not get the tax benefit of buying a second home or condominium as an investment. It was taken away. These people were making decent livings. 50-, 75-, $100,000 a year. A way to avoid taxes legally was to invest in condominiums. And those markets were strong. That's the incentive that put Ellis Neder in the market.

But what happened? They changed the rules. Now what do you have? You've got a developer who owes a lot of money. When I say "owes a lot of money," ladies and gentlemen, you will find out that Ellis Neder personally guaranteed every single loan that he made at that bank. Voluntarily, to any of the lenders, personally guaranteed it.

As I told you, he started off. He made a small success. His net worth probably at one time was up to about $7 million. He said, "No. I'm going to go forward. I guarantee it all personally. If any one of my projects [Tr. 97] doesn't work, I lose everything." That's the kind of faith he had.

Somebody with criminal intent, ladies and gentlemen, doesn't do that. They hide behind corporations. He said, "Forget about the corporations. I guarantee it personally. If it all falls, it all falls. This is what I want to do."

So that Tax Reform Act, ladies and gentlemen -which, again, the economists who come in here will tell you -- is costing us a fortune today. They'll probably tell you that George Bush won't be the next President because of the repercussions of that that we're all suffering today. It destroyed a lot of people. It certainly destroyed Ellis Neder, and it certainly hurt the banks.

But the evidence will show they were on -- and experts will testify to. They were on a suicidal path anyway.

Now, there's some talk about how Ellis Neder had put down down payments for certain people. Ladies and gentlemen, that's absolutely true. He did. But he himself did not do that. He formed what they call an equity corporation, something he had read about -- and you'll hear some testimony about what it is. It's where somebody puts up their credit, their intent. You put up [Tr. 98] the money -- okay? -- and you invest in something. In this case it was a condominium. And at any time before the condominium sold -- if it sold for a profit, you share in that profit.

You heard something about reservation agreements. And by the way, ladies and gentlemen, there's nothing in any of those agreements with the banks that said that he can't do that. This again was a new concept. This was a concept which in fact was a reaction to what was happening in the market, and all these great thinkers, real estate people, were saying, "Hey, try this."

So what did Ellis do before he did that? He went to his lawyer again. He said, "Tom, I heard I can do this. Can I do it?"

"Let me check," Mr. Turner said. He came back a few days later. I checked with the Home..." -- whatever the federal agency is. "Yeah, you can do that."

He said, "Fine. Let's do it."

So what did he do? By this time he had an organization. Real estate people, a mortgage broker, sales people on the force. He said, "Go out and sell this." There was a contract that was drafted. "Sell this."

Now, ladies and gentlemen, I suggest to you that he later found out that some of these people that he asked to [Tr. 99] do that perhaps weren't altogether honest with him. Now, the people he worked for that he personally talked to, like some

of the attorneys that worked in his office -- he said, "Yeah, you can do it."

They all said, "Are you sure?"

"Look. I checked with Tom Turner. He's a real estate lawyer. You call him. Tom says it's okay."

And you'll hear from every single employee who worked for Mr. Neder that will come in this court that he never did anything without consulting Tommy Turner, quote, his real estate lawyer expert at the time. He said, "You can do it." Fine. And he did it. Nothing clandestine.

The only thing he put in that contract was a nondisclosure because he said, "You know, this is a great concept, a great idea. It's legal. I don't want every potential developer in Jacksonville to start doing this. I'll create my own competition using my methods." Once again, with that good faith he did that.

Well, ladies and gentlemen, I told you that predominantly we're talking about the S&Ls in this case. There are also two other lenders. One is called the Greyhound Corporation; the other one is called the United Brotherhood of Carpenters and Joiners, a New York union. The union, ladies and gentlemen, the government is telling you was a victim in this case. I'm not going to go into [Tr. 100] too much details of what the evidence will tell you about that union, but you're going to have to look very, very closely about their practices.

You'll find out that this union had a fellow named Adler and another guy down here named Fitzsimmons who were actively mortgage brokers for the union and advisors, financial advisors who go out and find people who needed money, and they would lend it to them, for both land acquisition and later on for construction.

And one of the terms that they would want is, "Hey, if I give you the money for land acquisition and construction, you use union labor." Any builder who had the right kind of a project that would sell for the right kind of price could probably do that.

Well, such a project was Reddie Point. Reddie Point, ladies and gentlemen, sits at the end of University Boulevard, at the end, the very end of University Boulevard next to a very successful and a beautiful development called Charter Point. But it's even more valuable than Charter Point because it's right on the river, all of it. Mr. Neder had an idea. Once again, the sketch. This property could really be developed. He had the idea of putting townhouses, individual homes, condominiums, with a yacht club right there on the river, with great access to the Intracoastal, close to town and [Tr. 101] yet you're away from it all. And he hired appraisers, as he did all the time.

Now, I'm not going to talk too much about the appraisal end, ladies and gentlemen, because the appraisers are represented by two very competent counsel, and I think they'll handle that. And they'll tell you what appraisers are and what they are not. I'm just going to tell you what they are not.

They're not a science and they're not a fact. It's an opinion. And I think the analogy that you'll hear from the witness stand is, "Look. I've got this little general store on the corner of I-10 and somewhere else. Okay? And it ain't doing very well."

However, somebody with a better idea and with a better use of that land and had the better idea of what to do with that land and use it to its highest potential, that very same piece of property could be worth five times, not two times, but five times its worth if it's used properly. In that case, who knows? It might be McDonald's; it might be motels; it might be something else. But it's certainly worth more than it is to have

a general store on it. Some people just buy general stores and just rip them out and put what they want to put on there and pay more than the property is worth, than the property would be worth as a general store.

[Tr. 102] And appraisers have to go out and use that kind of assessment. Like I said, I'm not going to deal with that. You people have been here a long time, and I don't want to keep you any longer than I have to. I believe co-counsel will deal with that issue.

Anyway, people came down from the union and they said, "Yeah. This is beautiful. It really is. We like your ideas. We like your plans. What do you need?"

"Well, first of all, I need $6 million to buy the land. I believe the land -- I mean, the land is worth a lot more."

In fact, it was. It was on the market way before Mr. Neder for over $9 million.

"Fine. We agree. I'll tell you what," they said. "We'll let you do a couple of things. We'll let you buy the land. We'll give you some more money down the road to do some construction on it. What do you need altogether?"

He said, "I'll probably need about $21 million, $22 million, for the project."

Well, they advanced him 6-, and altogether it's about $14 million. Now, there was some talk about the construction draw-downs, that false invoices, quote, false invoices were sent. And a part of that loan agreement was, "As you need the money for construction, tell us what it costs, give us an invoice or a proposal, and we'll make [Tr. 103] a decision."

This fellow Paul Adler would make the decision. "And we will recommend to the union to go ahead and advance you the money."

Well, Ellis Neder said, "Well, do we have to do it that way? Normally that's not the way I do business, you know. I..." --

"No. We'll do it that way."

Well, as time went on, the other $7 million to complete the project wasn't forthcoming. Meanwhile, he's paying an enormous amount of interest on that money, as well as other projects. Make no mistake about it, ladies and gentlemen, the money wasn't to change from the different loans that he got. Okay? But the important thing is the money all went back into the real estate, into the project. He did not spend $40 million on a lavish lifestyle. There'll be no evidence of that. It all went back into the project, and he was running short of money.

So he says, "Mr. Adler, I'm running short of money. The only way I can get any money to keep this thing alive, keep it afloat," he says, "is through the take-downs."

Well, Mr. Adler turns around -- and Mr. Adler is a pretty gruff New Yorker. And he says to him something to the effect that, "I don't care what you do. Keep it [Tr. 104] afloat until I can get you some more money." Those weren't the exact words, ladies and gentlemen. When we get to know each other better, we'll hear the exact words that he said.

Now, who's Adler? Adler was the financial representative of the union. He had the power-of-attorney to do whatever needed to be done between Mr. Neder and the union. And what did he say, in effect? He said, "Go ahead."

And that's what he did, ladies and gentlemen. We're not going to sit here and tell you that what the government is saying is not true. No. We're going to tell you that he had permission to do it.

But what did Ellis Neder do? He kept a record of every single thing that he had done, so when the money came he could pay it all back in a hurry. Well, the money never came.

And probably the worst part of serendipity that could ever happen to a man was that while he was in the middle of this project with all of the other problems, you'll hear evidence that an archeological find was done on the property which ceased and desist all work, an Indian burial. What did that mean? That meant that the government had to send representatives down, search the property for artifacts, and make sure that you can develop [Tr. 105] certain parts of it and certain parts you can't. All work had to stop. Well, ladies and gentlemen, that was the straw that broke the camel's back.

Had -- and I don't think there's going to be any discrepancy about that. Had Reddie Point been able to go forward through fruition, everybody would have been paid except Mr. Neder. It was that kind of a project. It was just gorgeous. Even in the worst market that we had at that time -- and you'll hear from the people who were selling it -- the sales were phenomenal. The interest was unbelievable, because it probably was the best project. And it could have saved everyone.

But that wasn't to be. The union backed out. No other money was forthcoming. And Neder Properties was on skates. It was the end. The end was coming.

So what did Mr. Neder do? He turned around and gave back all the property that he had acquired to the lenders, voluntarily surrendered it. It didn't work. He lost an awful lot the money; they lost some. But you'll hear from the evidence not as much as they say they did, because they were taking tremendous interest. $800,000 here, $300,000 here. Okay? And it failed. The business failed. The banks weren't robbed,

but the business failed. We suggest to you the evidence will tell you there was no crime.

[Tr. 106] The government tells you that this is a big bank fraud case, that sort of thing. I'm sure people will be looking for evidence of Swiss bank accounts, bank accounts in the islands. Ladies and gentlemen, there will be absolutely no evidence of that. Mr. Neder is broke. I have the privilege of being appointed to represent Mr. Neder.

MR. KUNZ: I object, Your Honor, and would like to come to sidebar.

THE COURT: Come on up.

(At the sidebar:)

MR. KUNZ: Judge, counsel has told that the jury that he's court-appointed. That's totally irrelevant and improper, Judge. He's trying to vouch for the fact that his client alleges he's broke. That's totally irrelevant. It's improper.

MR. FALLIS: Your Honor, I believe it's quite relevant. We'll be having evidence that Mr. Neder is in fact indigent for all practical purposes. Financial statements would be --

THE COURT: Well, that's for a matter of proof, not for a matter of appointment. I'll sustain the objection, and I'll instruct the jury to disregard it.

MR. FALLIS: Your Honor, I do want to inquire further into his financial status and tell them that he [Tr. 107] has --

THE COURT: You can go into the financial status. But the fact that you were appointed to represent him

can't vouch for the fact. That's totally separate and apart. It's not evidence here.

MR. KUNZ: He was appointed, Judge, in 1991. The indictment is '84 to '88.

(In open court:)

THE COURT: Ladies and gentlemen, I've sustained the objection to the comment that Mr. Fallis has made to you. You will disregard his comment about why or how he's representing Mr. Neder in this case. The evidence with respect to the question of what happened with the money or who got what or didn't get what will come from the witnesses.

As I told you in the opening, what these attorneys are saying now is not to be considered by you as evidence at all. This is what the attorneys believe the evidence will show. And it may or may not. That's what we're here to find out.

MR. FALLIS: Ladies and gentlemen, Mr. Neder is broke. And the evidence will show you that there were absolutely no payoffs to the banks, to any of the people he worked for. No one made any more than a fair salary. He himself drew nothing more than a fair salary.

[Tr. 108] The government won't even allege that there were any because there aren't any. Let's face it. If there were, you'd know about it. And you've got IRS, FBI, everybody else working on this case. There are none.

And why aren't there any? Because all of the money was put back into all of the projects on the hope of bailing out.

Now, why is that important? It's important, ladies and gentlemen, because, as I told you, this is a criminal case. The government -- and really the only issue in spite of every single thing you've heard and all of the small little issues that you heard, there's only one issue in this case. This case is really

more simple than it appears to be. And that issue is did Mr. Neder or anybody else have the criminal intent to defraud. That's really simple. Not did anybody lose money, were there mistakes made, was there incompetence, was there even greed? The only issue that you will have to decide after hearing all this evidence is was there the criminal specific intent to defraud.

Now, remember, ladies and gentlemen, as the Court told you before, it's going to be quite some time before any of us will be able to get up here and put on our case. We ask you to please keep an open mind. Resist the temptation from sitting here for maybe a month or two [Tr. 109] months -- I don't know how long Mr. Kunz has in mind -- of taking in all of this government evidence and making your mind up then. You can't do that. You've sworn that you wouldn't do that. Please keep an open mind until you've heard all of the evidence.

But we will ask you to do something. While the government is putting on their witnesses, they'll be directing their witnesses. We ask you to please listen to cross examination as intently and as hard as you did to the direct examination. That's very important.

Now, ladies and gentlemen, like I said, it will be some time before any of us get up here and put on a case and tell you about what our clients' case looks like. Once again, please don't make up your minds. We are going to put on a case. Don't shut out the possibility of making the decision after everything is in. Don't be led into that. You're jurors and you've taken the oath not to do that.

Thank you.

THE COURT: Do you want to go now or wait until after lunch?

MR. MAKOFKA: We'd like to wait until after lunch.

THE COURT: Okay. Ladies and gentlemen, it's 12:00, so we'll take the lunch recess at this time. [Tr. 110] Remember the instructions that I've given to you earlier. Do not discuss the case with anyone, even amongst yourselves. Do not form any opinions or conclusions at this juncture. Do not read or listen to anything if it happens to be covered in the news media.

Be back at 1:00.

(The jury is excused.)

THE COURT: You may be seated. When we come back after lunch, if you want to take a minute or two and explain to the jury what direct examination and cross examination is, I'll allow you to do that, if one of the attorneys wants to. They don't have the foggiest idea what you're probably talking about.

MR. KUNZ: What time do we return?

THE COURT: 1:00.

(Recess, 12:00 noon.)

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EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[JURY CHARGE CONFERENCE]

[Transcript Volume 33]

[Tr. 27] * * * MR. FALLIS: Judge, I don't think we're talking about form. But I think we should consider the fact that those pattern instructions are just suggestions to the Court. I mean the Court can change the wording at any time it wants. I don't think we ought to be locked to the pattern instructions here. And I think what you've got there, you

know, sounds very reasonable and flows well. I don't think that, you know, that we're locked to the pattern instructions. I don't think the pattern [Tr. 28] instructions in every case have to be out of the same mold.

MR. KUNZ: It's fine, Judge, I won't object.

THE COURT: Okay.

MR. KUNZ: Judge, could the defendant be plural here? It should be plural, shouldn't it, the defendants, because on some of them we have plural and some we have single, and there's really no rhyme or reason. I think we should be consistent.

MR. MAKOFKA: We could say a defendant instead of "the."

THE COURT: I would prefer changing it to "a", "a defendant."

MR. KUNZ: Because you give an example, on page 17 you say the defendants, so I mean we should be consistent.

THE COURT: Make it "a defendant can be found guilty."

MR. KUNZ: All right, sir.

THE COURT: We'll do that on all of them.

MR. KUNZ: All right.

THE COURT: Any other problems on 10? 11? 12?

MR. KUNZ: On 12 we need "a defendant."

THE COURT: "A defendant" again. Okay?

MR. KUNZ; You don't want to hear about the [Tr. 29] supplemental instructions here?

THE COURT: Pinkerton?

MR. KUNZ: That's where I think it should go.

THE COURT: Let's wait and hold on on that.

MR. KUNZ: Okay.

THE COURT: 13?

MR. FALLIS: Your Honor, where did the definition of false and fraudulent statement come from?

THE COURT: On the bottom of the page?

MR. FALLIS: Yes, sir.

THE COURT: That came out of an instruction that I used in the case in Tampa as to the definition.

MR. FALLIS: Okay.

THE COURT: Let me look on here. I think it's also in the -- I can't remember what Circuit. I think it was the Eighth. I had to go to the Eighth Circuit to get that.

MR. FALLIS: I don't have an objection to that, but I do have an objection to the material fact, and --

THE COURT: "A material fact is a fact that would . . ." --

MR. FALLIS: Correct, hum, but, but the problem is when we merged that into the material and false saying that that's not a question for the jury to decide, what's material.

[Tr. 30] MR. KUNZ: It's not.

THE COURT: It's a Court question.

MR. FALLIS: Well, before I get to the point, I want to know what's the source of that ruling because the statute, you know --

THE COURT: The case law.

MR. FALLIS: Well, I appreciate that, and that's what I'm asking. What is the authority on the case law?

THE COURT: There's tons of cases in the old Fifth Circuit and the Eleventh Circuit that the issue of materiality is one for the Court to decide, and you'll notice I had to, when we get to the tax count --

MR. FALLIS: Yeah.

THE COURT: -- even though it's not one of the essential elements, the statute and the indictment as drafted, it includes the words "a material false statement," but the instructions omit it the way that it should in order to avoid the jury from saying, hey, the indictment says material, but the elements don't, so you put that in there so they know to disregard it, and I'll make a factual finding on the record about the materiality as to each of the counts. That's a Court question.

* * * * *

[BENCH RULING ON MATERIALITY]

[Transcript Volume 34]

[Tr. 219] * * * THE COURT: Okay. Do you want to -- anybody want to argue anything additional on Rule 29 motions?

MR. FALLIS: No, Your Honor. I stand on my previous arguments.

THE COURT: Okay. Previous rulings will apply.

With respect to the issue of materiality on all the charges that have the false statemens, I conclude as a matter of law that the evidence establishes beyond a reasonable doubt that the statements were material to the institutions to which they were submitted to. So in accordance with the preliminary charge conference that we had last week, the issue of materiality will be for the Court to decide.

Now, is there anything else you want to take up before we get into the instructions? Because I don't have my copy. I've got to go get it.

MR. KUNZ: The only thing we would mention with respect to the materiality to the institution, also as to the filing of the subscriber of false income tax returns.

THE COURT: Yes. Well, the false statement thing. That's the IRS. The same ruling. The same will apply.

* * * * *

[DEFENDANT'S CLOSING STATEMENT TO THE JURY]

[Transcript Volume 35]

[Tr. 168] MR. FALLIS: Please the Court. Counsel.

Ladies and gentlemen of the jury, I'd like to join with the Government in thanking you for your sacrifices. I know it's been long, it's been a couple of months -- actually over a couple of months, and I'd like to thank you on behalf of Ellis Neder, who has asked for his day in court, who's asked to be heard by you, who's asked for the privilege and his right to testify and to present his defense.

The Court has told you all along that Mr. Neder did not have to put on a case, nor did any other defendant have to put on a case. We could've sat here on our hands and the [Tr. 169] Government would've still had the awesome burden of proving his guilt beyond and to the exclusion of all reasonable doubt.

Obviously, that didn't happen. Mr. Neder didn't want that to happen. He wanted you to hear everything. He took the stand and he told you in his own words exactly what happened back in the eighties. He didn't have to subject himself to the cross examination of the experienced prosecutor, but he wanted to. He wanted you to hear both sides of this story. And it is a story, ladies and gentlemen.

Now, before we go on to discuss the evidence in this case, I'm going to tell you right from the start I've got some good news and I've got some bad news.

The good news is this is probably the last time that you're going to have to listen to my voice or probably look at me. Okay?

The bad news is that law school is not over for you people. You all sat here and took Business Associations I, and you learned about corporations, you learned about nominee corporations, and you certainly learned about principal and agency relations. Now, you're all ready to go out and get an A in the course, I'm sure.

Now it's time to learn a little bit about criminal law, because, ladies and gentlemen, this is a criminal case. [Tr. 170] We're in a criminal court.

What the Government has done, I suggest to you, is disguise a civil case to look like a criminal case, and it's very important that you understand that.

Criminal law is a lot easier than business associations. Criminal law is very simple. For anything to be a crime there are things that are necessary; one is the mental intent and the other is the action.

Lawyers have fancy words for that. One's called the mens rea, the required mental intent, specific intent to commit the crime. The other portion is after the rea, which is the action. Not all actions are criminal unless there is specific intent to commit that crime. All these things that are uncontroverted here, those actions are not criminal unless you determine that Mr. Neder, or any other defendant, acted with criminal intent.

The Court will read you the instructions on the law, you'll take them back with you, and it will say, he must have willfully and knowingly committed this or done this with the intent to commit a crime.

Now, there are defenses to that. One of the major defenses to that, ladies and gentlemen, is a good faith defense. If, after you have gone through all this evidence and you go back and you weigh that, and you say to yourself, Mr. Neder did all the things that the Government is accusing [Tr. 171] him of doing but he had a good faith belief that what he was doing was proper and not a crime, then he is not guilty of anything in that indictment; because they've got to prove the mental state. And I suggest to you they have not met that burden because what the Government has chosen to do is concentrate on all the acts without bringing any real evidence as to what Mr. Neder's mental condition, mental state was at the time.

I don't mean his mental state, whether he was sane or insane, that's something entirely different; whether or not he had the specific intent to defraud. Defraud means to deprive someone of something, and let's face it, common sense, get

unjust enrichment for this. It's stealing. To be a thief. It's simple, criminal law is that simple.

I suggest to you that the evidence shows you quite the opposite. Mr. Kunz in his opening and in his closing said you're going to see this big pyramid scheme. You didn't see a pyramid scheme. What you saw, ladies and gentlemen, was a developer who borrowed money -- sure, he borrowed money, and he borrowed money for property in excess of what he paid for it. That's not a crime, that's absolutely not a crime unless he in doing that had no intention of repaying that money. That's stealing, that makes it a crime.

The evidence tells you quite differently. What did this developer do? This developer borrowed money and he [Tr. 172] borrowed in excess, and we'll get into why that's not a crime, and he put all the money back into his business. Sure, lousy bookkeeping, and you know something, maybe a lousy business man, but not a criminal.

Mr. Willertz got up here and if you recall, I said, well, did he steal the money? Did he send it off shore? Did he do this? No, no, we're not accusing him of stealing the money, we're accusing him of diverting the money. Do you recall that testimony? That's very important testimony.

And because he diverted the money, money which he borrowed, by the way, and he signed personally for, that's not the kind of person who had no intent of paying back. When Mr. Neder started out he was a moderately successful lawyer, actually a very successful lawyer with a net worth in excess of a million dollars. What did he do? He said, well, I changed my career, I put it all on the line, go for broke, and he guaranteed everything he took.

What did he do next when he decided to go into business, into this new business? He went and he hired what

he thought was the best attorney that he could possibly find, and in all those projects hired the best architects. This is not somebody who's looking to borrow some money, take it and run. That's the crime. That didn't happen here.

You sat through this whole trial and you saw what these [Tr. 173] projects looked like. You saw the money, the staff that was created. That's not what a thief does, a criminal does. They go in with limited, limited resources, take what they can and they're out of there.

Mr. Neder had borrowed a lot of money. I haven't added it up yet, but probably in excess of twenty-five million dollars, maybe thirty million dollars. But where did it go? It all went into business. A thief doesn't do that. He'd stop after the first four million, five million, six million, when he's had enough, and he's out of there.

What does he do, take off, maybe if things are bad declare a bankruptcy and keep what's left? Mr. Neder did none of those things. He got into financial difficulties, and in the United States of America it's not a crime to be unsuccessful in business. You don't go to jail for that. You don't get indicted for that.

And what did he decide to do when he ran into difficulties, like I said, cut and run? No. He said, no, I'm going to build my way out of this, and he tried and he tried. You've heard the testimony, even the Government's witnesses, what did they say, yeah, he's a workaholic, he was -- he tried real hard. We brought in, not the Government -- okay -- we brought in an accountant who went in and she did a chart, and she showed the millions of dollars, where they went. Sure, it was money taken from [Tr. 174] Reddie Point and went somewhere else. It didn't go into his pockets.

Life style -- over a four year period of time the man brought himself a couple of cars, took a couple of vacations, a man who, by the way, had that kind of life style, and his law practice supported that kind of life style. That's not a crime, that's just smoke that the Government has thrown at you to try to create some kind of ill feelings about what happened, saying here's a man who's supposedly in financial difficulty and he's still living well. Ladies and gentlemen, over a four year period of time that's not living so great.

And, what else did they say? Our accountant, don't forget, came in here and she said, I can account for all of this; and then there's somewhere over a million dollars that was some made out to cash, some made out to Neder, that went into different accounts. Okay. Not into his pocket, not into some off shore account. And by the way, do you recall Mr. Kunz saying, asking Mr. Neder on the stand, "Did you tell somebody in October of that year that you had money off shore to hire a lawyer with?" and he said, "No."

I guess you were expecting somebody to come in here from the Government and say, yeah, Mr. Neder told me that. No one did, because it never happened, because there is no other money.

[Tr. 175] Mr. Neder was here two weeks ago and told you he had thirty-eight dollars in his pocket. That's unrebutted. Okay. A thief who has dealt with millions of dollars does not wind up flat broke. Common sense won't allow you to reach that conclusion. They want you to reach that conclusion.

What else did the Government try to do to try to turn you against Mr. Neder? The statements supposedly by, whatever her name is now, Driggers, whatever her name is, that woman with the six names -- okay -- who worked for Mr. Neder for five years, saying, "Wow, yeah, he said he had a

license to steal." Ladies and gentlemen, he told you the context of that.

Can you imagine if we all had tape recorders in our offices and in our homes, and things were taken out of context? You know what must've happened, the Government grilled this lady -- this lady, by the way, who signed her stepsister's name and was petrified, was granted immunity to testify and the Judge will tell you, anybody who's offered a deal by the Government his testimony must be given great caution. That's a nice way of saying, watch out to what they say. You'll get that in a jury instruction. And she's one of those people, so you have to imagine what was going on.

The prosecutor said, well, what did Neder ever say or [Tr. 176] do? Remember five or six years, did he ever say anything about stealing? Oh, yeah, he once said -- and that's the context of it.

Mr. Neder was not a lawyer who had a license to steal or ever tried to steal. Matter of fact, even Mr. Moore and everybody else testified that he had an excellent reputation as a lawyer. Mr. Moore said he kept working because he was so, he was very honest, and he earned that reputation in twenty years in the practice of law.

Don't be taken by that. That's the kind of garnishment, the kind of smoke that they want to throw at you to turn you against the defendant in this case, Mr. Neder. That's not what this case is about.

As I told you, this case is nothing more than a civil case that's being disguised as a criminal case. This is a case where banks lost money, Mr. Neder lost money, and a lot of people lost money. In cases like that they're usually suing for money. Okay? Dollars. In cases like that, those civil cases, the proof, the proof that Mr. Neder is liable to those people is real simple,

it's by a preponderance of the evidence, maybe fifty-one percent. If you find he's fifty-one percent at fault, he's liable for that. Okay?

In a criminal case, not so. The proof, the burden of proof that Mr. Kunz and all these agents and everybody else the whole United States government has to prove against Mr. [Tr. 177] Neder and every other codefendant is beyond and to the exclusion of all reasonable doubt on a scale, ladies and gentlemen, that looks something like this. They've got to put enough evidence on every single count to prove beyond and to the exclusion of all reasonable doubt that he committed a crime. Not that he was a bad business man, not that maybe he might owe some bank some money, or that it's a civil fraud case or something like that. No, a criminal case. And our forefathers have made it that way.

They said -- Mr. Kunz got up here and said, I thank you on behalf of the United States of America. Well, ladies and gentlemen, Mr. Kunz is not the United States of America, he works for the Government; and neither are any of the IRS agents, FBI agents, or anybody else, they're government employees.

Do you know who speaks for the United States of America in this courtroom? You do. You are the United States of America because the United States of America has a constitution and in short it says, the Government, in this case Mr. Kunz, the FBI, IRS, you cannot do to any fellow citizen what you want to do unless we're here. Now, our founding fathers knew what they were doing. They were brilliant in that, because they never trusted the people in power because they can change. But when you put that in your constitution there is one check on the powers that be [Tr. 178] on the elite, and that's twelve people from the street. Twelve citizens, the most powerful people in this courtroom.

More powerful, certainly, than anybody at the defense table, more powerful than anybody here. And you know something, more powerful than the Court itself. You answer to no one, your decision is final. If you don't like what's happened in this courtroom, say it, and they have no choice because you are the ultimate deciders of fact, of what's going to happen in this case. No one can ever second guess you. That's an awesome power and that's why you took that oath.

Do you recall every time you walked in and walked out of this courtroom we all stood up? That's respect for what you symbolize, that's what it's for. We don't know you people individually, you're probably all wonderful people, I'm sure, but we stood up for respect, to symbolize those twelve people who are the ultimate, ultimate power in this courtroom. You've taken vows to use that power properly, fairly, to keep a check on the Government, to make sure that they don't do anything that you disapprove of; and not just for Mr. Neder, for everybody. That's what you took that oath for.

You didn't come into this courtroom to work for the Government. You came in this courtroom to work for America and every single citizen in this country. We're asking you [Tr. 179] to do just that. Now that we know what we're all here for and what our roles are, I'm sure you're going to do your job.

Now, I said to you that this is a criminal case disguised -- is a civil case disguised as a criminal case. You've had law school, you've also had some history here.

We brought in some witnesses. We brought in a professor from Wisconsin, yes, Dr. Fish; and his purpose was to come in here and tell you what was going on back in the eighties, in a world that probably none of us, with the exception of Mr. Neder, Mr. Turner and a few other people who were involved, and those bankers who came through here, were involved in that world. So open up that window and let us look

in and see what was going on. And he told you what was going on.

Now, Mr. Kurz made a big deal about are you getting paid for your testimony? He said, "Yeah, I am," he said, "I'm getting sixteen thousand." Mr. Wilhoit said he was getting seven thousand, I think; the accountant was getting four thousand. Ladies and gentlemen, this is America, this is not communist China. People do get paid for their services.

What was the Government trying to impute, that they're going to lie because they're getting paid? This is a professor, ladies and gentlemen, who took an oath, with a [Tr. 180] reputation. And I asked all those witnesses, did your reputation mean anything; of course, it does. They're not going to go on the stand and lie for Mr. Neder or anybody else. They came on the stand to tell you just like it is. But the Government wants you to think that maybe they're lying because they're getting paid. Okay?

On the other hand -- and if they're getting paid, what are they getting paid? Dollars.

On the other hand look at the Government's witnesses, like Mr. Turner, Michael Loyd, Ms. Manss, they're getting paid too, but something a lot more expensive, something more dear than dollars -- freedom. Think of the awesome power of this Government.

I suggest to you, ladies and gentlemen, that if anybody's going to perjure themselves or lie to get a better chance they're going to do it for their freedom than for a few bucks.

And once again, remember the Court's cautionary instruction, anybody who takes that stand who's made some kind of a deal with the Government, caution, watch out. And that law, that instruction is in there for that purpose.

Well, enough about people committing perjury or people stretching the truth, because if anything the Government witnesses have more of a tendency to do that than any witnesses we call.

[Tr. 181] What did Mr. -- Dr. Fish tell you about the eighties? He told you what the economics was like, what bankrupt was like. What happened? The Government, once again, set the S&L's loose in the eighties. They were confined to home mortgages and small loans, maybe ten percent they can go commercial. All of a sudden their friends in Congress, who knows, the President, the most powerful people that be in Washington said, okay, guys, you've got a license, you've got to go commercial, and boy, they did.

And they went out and they hustled loans all over. What loans did they hustle? Commercial real estate. That's what was going on, Dr. Fish told you that. They weren't bankers any more, they were loan production officers. Think about that. A loan production officer to keep his job has to do what? Produce loans.

He told you the competition was fierce because not only were the S&L's competing with the commercials now, but also private lenders like the two in this case, Greyhound and the union. Everybody was getting in the act. And what's happening when everybody's getting in the act? They get just like a neighborhood candy store, a neighborhood convenience store. The more of them, the more reckless they get.

And what were they doing to the real estate market? They were driving it up, as Dr. Fish said, almost without [Tr. 182] reason, and it affected the economy. Real estate, I mean people would buy a piece of real estate like one day and a month later they would make tremendous profits because of the supply and demand, the availability of money. Jacksonville was

no different than anywhere in the United States, it was happening all over. And that's what happened.

They went out there -- Ms. Doerr told you. I said, "Ma'am," I said, "...were you an aggressive lender?" "Oh, yeah, we lend money." Do you recall how she said that? Everybody knew that Caribank was lending money. Think about it. Think. They were out there aggressively lending, which means that they also dropped their standards, because they were competing with the guy next door who might have higher standards. And how do you compete in the same market? You drop your standards, you look the other way sometimes. You pretend on fiction, you do what you can to note your files, go back to your committee and say, okay, this loan is good, we got all the bases covered. Okay?

But what did Ms. Doerr say? This is really important. She said we had lent Mr. Neder some money, we had a good experience, and all of a sudden her bosses said, hey, there might be some land flipping going on out here in the United States, let's be careful of it, make sure that everything you lend to there's arms length transactions. Now they're [Tr. 183] on the alert for this, right? And so she did.

She called Mr. Turner, she said, "You know, we're going to have to get..." -- "...my office is going to have to get something to say that this is..." -- quote -- "...an arms length transaction."

Well, Mr. Turner knew darn well they weren't arms length transactions, and even Ms. Doerr knew they weren't. How did she know? Because Mr. Neder told her. Don't you recall, he told her in so many words, her and her boss, Dan Conlan, or whatever his name was, out on the golf course. He said, "How do you do this?" "I have other people buy the property for me, I buy it back." No problem.

Did they stop loaning him money? No, they lent him another two million dollars after that, and that's unrebutted testimony. Did Marga Doerr come back here and say that didn't happen? No. And it was only through cross examination that I got out that she had this conversation on the golf course with her boss and Mr. Neder.

So what happened? Give you an example, and Marga Doerr is a perfect example. Banks were lowering their standards, doing what they had to do to get around the regulations. Dr. Fish told you what they would do sometimes if they wanted to charge a higher rate, they would have somebody form a nominee corporation because they could get a higher interest rate from a corporation than they can from an [Tr. 184] individual person. And they did it. In this case she wanted to document the files to please whatever the bank examiners, because I think Dr. Fish testified they were around, you know, that this was an arms length transaction; and when it all fell through, now they're screaming fraud.

Ladies and gentlemen, you cannot defraud someone when they know the truth. In this case they were told the truth. By definition fraud is something you do to somebody who is unsuspecting, who doesn't know, you conceal it from them. Mr. Neder never concealed it.

These two affidavits that the Government placed so much emphasis on are not concealment. I suggest to you they are more than that. Ladies and gentlemen, this is something that was drafted by Mr. Turner. Now Mr. Turner says, "I only saw one of those, I didn't see both of them." He admitted to one because we had a piece of paper, you recall, that had his own penmanship on it. He said, "Well, all I did was correct the punctuation." You don't pay your lawyer $125 an hour to correct the punctuation on an affidavit, you pay him that kind of money to draft the affidavit. And he drafted both these

affidavits. And what did they say? They satisfied the loan officer.

The most important thing, ladies and gentlemen, is that it goes to his intent. He tells them right here and now in Paragraph 5, that, [Tr. 185]

"The corporation is an agent of affiant to the extent that the corporation has assisted affiant in acquiring the real property."

The same thing he did in the other affidavit to Ms. Doerr, to Caribank. He said the same thing. And, ladies and gentlemen, it's unrebutted and uncontroverted, that every other thing is a true statement if on that date Mr. Neder was in fact not an officer or director of the corporation, they were legally and technically true.

But that's not the point. The point is they were so concerned about whether or not Mr. Neder, what his relationship was with the company he was buying the property from, and now they're on warning now, don't forget, all their antennas are up. Their lawyer looks at this -- do you remember Meryl Gold when I asked her about that? I said, "Meryl..." I said, "...you went to law school, you had that boring course called principal and agent." And everyone that got on the stand, what does every agent have? Instinctive response, a principal. Who's the principal? That's the boss of the agent.

I think the Judge popped in, and I said, "That's a legal relationship, right?" and he said, "Sure." And I said, "Like husband and wife?" And I think the Judge said, "Well, who's the boss there?" But that's the kind of relationship it is. It's a legal relationship, and if they [Tr. 186] were concerned they'd better ask a little more about that relationship.

And not only that, Mr. Neder attended the closings, he brought Mary Millis, you heard, to the closings. He brought

Horace Marsh to the closings, all the people that were his nominees. You're not concealing anything when you're doing that.

Banks were welcome to come to the closings, their attorneys were welcome, but nobody cared. They didn't care. They wanted to produce loans.

They weren't being defrauded, ladies and gentlemen, they were being apprised. Okay?

Now, getting back again to the eighties, what was going on. All this real estate was going up, developers were going crazy all over. All of a sudden, like Dr. Fish said, somebody had to put the brakes on. So what did they do? They passed the 1986 Tax Reform Act, which everybody, including the government's witness, not just Dr. Fish and --okay -- Boackle, the attorney from Mississippi, all said that. Brooks, everybody said that. The bankers said it. That destroyed the real estate market. And who did that? The Government, again; and now we're all looking at this sickening five hundred billion dollar mess that was created by the Government.

Now what does Washington do? Gee, we're going to admit [Tr. 187] that we screwed up? Of course not. Are we going to go after, now, the power elite, the bankers and all them? No. We've got to account for this. How did they account for it? Let's find some criminals out there to justify what's happened.

They're not going to go after Ms. Doerr, they're not going to go after all the other bankers. No. Let's pick the weakest and the most defenseless, those business men who now have gone broke. That's what's happened.

Let's -- we can't go after them civilly because they don't have anything anymore, let's go after their freedom. And that's what's happened.

Because all this evidence, ladies and gentlemen, is nothing but civil evidence that belongs in a civil case. And that's what's happened here, ladies and gentlemen.

Now let's talk about what Mr. Neder was doing during this period of time. He got into, in '83, '84, he decided to get into the real estate business. Nothing big, small stuff. What happened in 1986 and 1987? What was he doing in that period when the Government passed that Tax Reform Act? He was in the middle of all his projects. Don't forget, we're talking about 1984 to 1988. In 1986 he had everything going. He was stretched thin, to be sure, and all of a sudden the market caved in on him.

And what did he do? Like I said, did he go bankrupt? [Tr. 188] Did he take whatever money he had borrowed and split? No. He continued to fight as best he could, and he came up with some innovative kinds of things.

He went to his lawyer, he went to his accountant. When he got there he said, look, what am I to do here? He said, I've got to stimulate sales, and Tom Turner said, and he admitted, he said, "What about this equity sharing arrangement?" He said, "Yeah, you can do that, Ellis, that's legal." He even drafted it for him, the agreement, the reservation agreements.

All that to try, not to take the money and run, but to build his way out and take care of his obligations. Don't forget, he had a line of credit even then that he could've borrowed even more and continue to borrow, and that's the way out. And he tried. What he did are not the actions of a thief or a criminal.

I told you, common sense tells you a criminal takes what he's got and he splits, or takes the next loan, does nothing and splits. But he didn't. He went on and on, he went to four

or five more projects hoping that at least one of them would pull him out of the mess that he was in. That's not a crime.

Yes, he diverted money. He was a lousy -- he kept lousy accounts, but he didn't steal any money. You can rest assured, ladies and gentlemen, if Mr. Neder had any money [Tr. 189] stashed anywhere in the world, not just in the United States, between the IRS, the U. S. Attorney's office, and the FBI, Labor Department, the most powerful investigative agencies in the most powerful country in the world, they'd find it. It just ain't there because he never did.

He did what he could do. He tried to survive. That's not a crime.

Supposedly, all these things that he did, statements, false statements to the banks, that kind of thing, technically were not prohibited by any of the agreements that he signed with the banks. There is no -- and I asked some of these loan officers -- and we'll go through them one by one -- as to what the agreements were.

Now, the Government -- oh, what has happened after the whole thing crashed? Everybody, every man for himself. Banks, developers, everybody keeps pointing fingers to try to justify what happened in this country.

Now let's look at the testimony. I suggest to you in order to find Ellis Neder guilty of the counts charged in this indictment, you have to believe all, one hundred percent, lock, stock and barrel, all the testimony of at least eight witnesses; and at the same time disbelieve one hundred percent of the testimony of Mr. Neder, Dr. Fish, Mr. Boackle and everyone else, if the Government thinks they can prove these charges.

[Tr. 190] Now, who do you have to believe? Well, let's talk about Mr. Phillips, who came back the second time, the man from Greyhound who was here yesterday. Now, if

you recall, and the Judge will tell you this, you've got to look at the demeanor of the witness. Does he answer the questions forthrightly? Does he protest too much? That sort of thing. Mr. Phillips was a wheeler-dealer. He came in from Arizona during the height of the real estate market here looking to make a loan, looking to make a deal.

Mr. Neder had a deal that he was going to do, then he changed his mind, he couldn't do it. He couldn't do it because he couldn't show them a down payment, and he told that to Mr. Wankowicz. I can't show you a down payment. Show me a check -- I can't show it to you.

And he said, "Well, I'll tell you what I probably could do, I could probably..." because he wanted to syndicate this operation, "...I have a, I have a trust fund, a land trust that's also included in one of my divorces," he said, "...in my divorce. I could probably take the money and put it in there, but I'm not sure that's what I want to do."

"Well..." he said, "...why don't you give me an affidavit to that effect." So he said, "Okay." That's August 1st -- don't forget, that loan didn't close until September, before Mr. Phillips came down here. He said, "Okay, I'll give it to you." So, he in fact did send out [Tr. 191] an affidavit and in that affidavit he says -- okay, and all these things are also the truth -- Okay? -- there's one thing that is absolutely not true because he had never completed what he had anticipated doing, and the fact is that that money was going to go into a, was going to be in a private trust account and was going to be a down payment. Okay, that's not true.

But, what good is this affidavit because the deal changed. This affidavit doesn't mean anything because the deal changed. It was no longer a loan that required a down payment.

How do we know that? Mr. Neder told you. He said because we restructured the loan it became a collateral loan. Not a loan based on purchase price down payment, a collateral loan which we all know has a different meaning.

Now, Mr. Phillips can get up here and say thirty times unsolicited this was not a collateral loan, but he can't get any, we never waived the paper trail. You recall he said that the first time he came by here? I said, "Sir..." I said, "...do you recall..." -- and I showed him a copy of a memo. "I never saw that memo. We didn't waive any paper trail," and he almost threw the paper on the floor.

I said, "Well, didn't Mr. Neder send you a letter..." I said, you know, "...thanking you for the collateral loan?"

"That was just a thank you letter." And he almost [Tr. 192] threw that on the floor the first time he came back.

The second time he came back I confronted him again with these two pieces of evidence, ladies and gentlemen, Defendant's Exhibit No. 1 -- and I read it to you before he came back. I guess the Government felt we'd better bring him back to try and try to explain himself away on this one. Okay?

What did it say?

"Based on the site inspection he conducted on August 12th and 13th, 1986, Dave Phillips had determined that the appraised value of the collateral appears to be quite reasonable and should be ample security for the purpose of the Greyhound loan. Therefore, the credit committee comprised of..." -- so and so -- "...voted to recommend that the requirement of a paper trail verification of the borrower's equity..." -- meaning down payment -- "...be waived."

It doesn't say we accept the affidavit that was submitted on August 1st, it says, no. And what do they say we do, we

have looked at the property and the collateral -- and the appraised value of the property -- not the cost to Mr. Neder, the appraised value -- and we find the collateral to be adequate. That's an indication, ladies and gentlemen, that the loan did change.

Now, that's not enough. They didn't throw this away, [Tr. 193] ladies and gentlemen, and if they had we wouldn't be able to argue. Okay? We have this memo. Their paper trail, so to speak. We have it.

And I asked him about this letter that Mr. Neder sent them on September 15th, 1986, in which he says,

"Thank you for your efforts in regard to closing our loan with Greyhound concerning the Belle Rive property. I do appreciate your looking at the loan as a collateral loan and flying to Jacksonville and reviewing the collateral to be sure that the value is there. I believe this made a difference in the transaction being closed."

Don't forget, it was an on and off deal, on and off deal until Phillips came down and agreed to do a collateral loan, which I think makes that affidavit meaningless. It wasn't used so you can't defraud somebody who wasn't used. It's being used now because we're in a criminal case. It looks like evidence of a crime, but it's not. Mr. Neder should have asked for that affidavit back, but I guess he trusted who he was doing business with too.

They can't get around these two pieces of evidence, ladies and gentlemen. These two pieces of evidence tell you, and you can use your common sense, okay, that that loan was based on the collateral. How do we know that? Because he wasn't forthright with you.

I said, "Sir..." -- I said the first time, "...what [Tr. 194] about this letter?" "That's just a thank you letter."

"Is that all it says?" "That's all it says."

Yesterday we got into the rest of it. Read this letter. This letter says a lot more than that. It tells Mr. Phillips and everybody else where they're going to get their money, what bank account the interest is going to be in, it's going to be in Caribank, it's going to be $200,000 there. That's per our discussions. Your being signatures on the, on the accounts, you could just draw out the money. These are Mr. Neder's instructions on the loan, how they're going to get paid. That's not just a thank you letter like he tried to cast off to you that first time. Unh-unh. It's a very important letter.

He said, "I didn't pay any attention to it, it's just a thank you letter." Not so.

Ladies and gentlemen, when it comes to all those counts that go to Greyhound, okay, the wire fraud, you must -- you must -- not you may, you must acquit Mr. Neder of those charges because you need only one reasonable doubt on any of those charges, one reasonable doubt, and you've got two here, two reasonable doubts why Mr. Neder did not defraud Greyhound, did not commit mail fraud on Greyhound. That's how heavy their burden is.

Who else must you believe? Well, Linda Alexon who was here yesterday for the second time, her encore performance, [Tr. 195] who came in and says she remembers all these little specific details of her conversations with Mr. Neder concerning the reservation agreements, and all that. She can tell you there was absolutely no yellow sticker on the reservation agreement that was delivered in May of 1986. She can remember that. And she can remember all these other conversations and all the memos supposedly that she sent to Mr. Neder of the conversations they had.

I said to myself, well, that's pretty interesting. "Ma'am, can you tell me when you approved those things?" "No."

I said, "Well, when?" "Sometime in 1986."

"Ma'am, can you tell me when construction began on that project?" "Sometime in 1986."

She was the loan officer. They were partners. SFG was partners, Security First were partners in this project. And you mean to tell me that she can't remember those two important dates? What month they were in, what season they were in? No, she couldn't. But she's over here telling you that she can remember all these other minute details. She doesn't. You know what she's out here doing? She's out here covering herself. That's what she's doing.

She has a motive and her motive is she doesn't want to look bad, doesn't want to look culpable for what happened. But you can't, you can't get around it. Because on the [Tr. 196] stand in cross examination she couldn't tell you the important things, but she supposedly remembers all the small things that occurred.

I also asked her about her responsibilities on those, on those reservation agreements. I said, "Doesn't the commitment say that you're supposed to confirm?" "Oh, no, we're just supposed to call the escrow agent." It's the escrow agent's job, supposedly, to call the people and confirm. That's not true. Escrow agents -- and we had testimony -- they handle the money. If there's a dispute they send it where it's supposed to go. Escrow agents don't supervise construction, they just hold the money, a neutral party that holds the money. They're not supposed to do that.

Now, wouldn't it be stupid for Mr. Neder, a lawyer, to go down to Daytona and hand twenty-five reservation agreements if he was trying to conceal something with people's

names and phone numbers on there? Amend them, as he did, okay, without them knowing, without their permission and leave them there? Of course it would, it stretches your common sense. A thief doesn't do that. Somebody that's out to defraud doesn't do that. That's not how it happens.

She was supposed to approve and confirm them. I asked her, "Did you approve them?" "Yeah, I did."

"When?" "I don't know, sometime in '86."

[Tr. 197] But she can remember, supposedly, that day when Mr. Neder came down to deliver them. That just doesn't make sense. It makes no sense at all.

You heard Mr. Neder testify. He's not a stupid man. And, yes, even though he's not a real estate lawyer, he's still a lawyer, and he's got basic common sense. He wouldn't do something like that unless they agreed.

I also asked her, "Is there anything in that loan agreement that prohibits the developer putting down the $500 deposit?" She said, "No."

"Is there anything in that loan agreement that prohibits equity sharing?" The answer to that was, "No."

The prosecutor would argue that we were concealing this equity sharing, but that's not true. You saw the contract. Mr. Turner testified about the contract. It says, you will cooperate with all the lenders. There was a non-third-party disclosure, but that's different.

I asked her, "When you read them together, what do you do?" She said, "You tell the lender everything but you don't tell anybody else." Okay. That's not concealment. And there's nothing to prohibit that from happening. Nothing did.

Now, once again, you can't defraud somebody -- now, Mr. Neder also testified that he had this whole conversation with Mr. Singletary, who is also an officer of Security [Tr. 198] First, he was the one who was also in charge of the partnership at SFG when they went into partners with the developer, and he told him everything about these, how he anticipated doing the equity sharing, how he was going to do the reservation agreements; and that testimony, ladies and gentlemen, is unrebutted.

The Government didn't bring Mr. Singletary back to say that Mr. Neder was lying, did they? No. So you know he's telling the truth. They brought back everybody else they could think of to tell you he was lying, lying about the weather, lying about everything else, but they didn't bring Chuck Singletary back, because Chuck Singletary knows Mr. Neder told him that. And he was the party that was responsible for the bank's forty percent. Okay.

Now whether Alexon and Singletary talked, I don't know. I know one thing, they work for the same people and Neder was dealing with both of them.

I also asked Ms. Alexon, I said, "Well, how many people work in that office?" "Five -- six, maybe."

Now, Mr. Neder didn't say I gave them to Ms. Alexon, he said, "I went down there, I changed them, I amended them, I revised them in her office over there and I gave them to somebody who worked there." Did they bring anybody back here to say that didn't happen? Of course not.

Now, let's talk about the acquisition on Southern [Tr. 199] Grove. Mr. Neder did the same thing on Southern Grove that he did on all the other projects. He contracted to buy it at a certain price through a nominee corporation, he had it appraised, and then he financed it at the appraised value, which

was, like Dr. Fish said, very common back then. Now, that appraisal was more than twice what the purchase price was on Southern Grove. Now, think about it. Did the prosecutor bring in anybody here to tell you that that was a false appraisal? No. That there was a conspiracy there with the appraiser? No.

That appraisal was done by Johnson, Grainger or some other firm, and it came out more than twice what the purchase value was. But they tell you, by the same token, that what happened with Mr. Neder and Mr. Smith and Mr. Fogg was impossible, you can't get property appraised at twice the value unless you work with a corrupt appraiser.

Well, how come they didn't make a big stink about Southern Grove. If it can happen to Southern Grove, it could happen ten, twenty times, who knows how much property you can find, because don't forget what's going on with property at that time. That made sense, you weren't buying raw dirt, you were showing them what you're going to do, and it had a higher value for a higher use.

Didn't the fellow that had Belle Rive make $400,000 just by holding an auction on it? He wasn't -- I asked him, [Tr. 200] "Did you get indicted?" Of course not.

But it was happening, so why is it so unreal that can happen. The Government obviously agrees that Southern Grove was no scam as far as the appraisal goes, or else you would see those appraisers sitting there as well, and we'd hear about it. But they didn't. They want you to have it both ways. It didn't happen.

Do you know what the Government is going to have you -- you're going to have to believe one hundred percent to convict Mr. Neder of any of these counts involving Reddie Point? Mr. Stanley Burns and Mr. Paul Adler. Some of you seem to smile -- yeah, that is a joke.

You know, there are charges in the indictment of RICO, racketeering. I suggest to you, ladies and gentlemen, there's been no evidence of racketeering on the part of Mr. Neder. The closest thing you got to see to racketeering, ladies and gentlemen, were those two characters, Burns and Adler, right out of The Godfather -- those two.

Can you imagine -- and I recall, we had to call them back again, didn't we, let's talk about their testimony.

He denied vehemently -- okay -- that he ever had any kind of arrangement with Mr. Neder. I think he denied, first of all, "I had no say-so on that, on that loan. I had no power, I was just acting on behalf of the union." He had to be cornered, I said, "Wait a minute here, you have [Tr. 201] the absolute power of attorney."

Remember he talked about, "Well, that loan commitment is the Bible, and it can't be changed," and I asked him, "Well, this power of attorney says you can change anything there, doesn't it? So I guess that, we know what that makes you."

"Oh, I could, but I wouldn't." He could but he wouldn't.

He had absolute power. And where did he get his power? At the time he was involved in the union he got it from Mr. Campbell, who was the president of the union. Mr. Campbell, whose son he had doing his lackey work for him, and his other son he had -- I'm sorry, his grandson he had, who was doing lackey work for him, and his son, who was his attorney and for the union, for both Adler and the union. Talk about a conflict of interest? That's where Adler got his power, and he could do anything he wanted.

So what happened? The regime changed down the road. Okay?

But before we get to that, think about what Adler said. He came in here and he said, I did everything I could for the Brotherhood; Mr. Neder's a thief, he's this and that, I thought I was dealing with honest people, and I would never, never approve of allowing Mr. Neder to borrow against the construction draws. He said that. Never. Never approve of [Tr. 202] that.

Everything in that construction, in that loan agreement had to do with construction. I asked him about that $400,000, what did that have to do with construction. Was that part of all these draws? Is that in this, in this document here that tells you, is there anything that says you build something for that $400,000? He couldn't answer that. No, that's just a side, a side thing.

So it's not true. That $400,000 went to something that had absolutely nothing to do with Mr. Neder or Reddie Point. That was the cost of doing business, that he had to pay the loan of somebody else, because that's what Adler came down to do, collect the loan for somebody else, and he felt Mr. Neder was eager to do business and he's going to make money. So he said, "Well, fine, you pay that and we'll go ahead." And then we brought him back -- oh, then I asked Mr. Burns, "Mr. Burns..." I said, "...are you having some problems with the union right now?" He says, "Oh, just a breach of contract kind of thing, nothing important." I said, "Oh, really? We'll talk about it again," I said, and I brought him back, ladies and gentlemen.

Do you remember the testimony the second time he came back? I asked him, "Sir, just a breach of contract?" "That's all."

"Well, how about breach of fiduciary duty?" "Well, I [Tr. 203] don't know too much about that."

"How about fraud to the tune of 1.5 million dollars that you, the union says you've stolen from them by submitting false invoices of your own for your services?" "That's just accusations, that's just accusations."

Do you recall that? He didn't tell you about that the first time. We had to bring him back to get that out of him.

Well, I suggest to you, ladies and gentlemen, not just Mr. Burns, but anybody who will submit false invoices of their own and think nothing of it, and cost the union something like seventy million dollars, eighty million dollars, I think that's what he said all those bad loans were that they were monitoring all over the place, would think nothing about telling someone to go ahead, borrow against the account, and when you get the additional funding -- and they said they were looking for additional funding for Mr. Neder from other unions if they could -- you can put it back. That is reasonable. That could have happened.

Now, Mr. Neder didn't like that. He didn't like doing business like that. He was desperate, so what did he do? As soon as there was a change of regime he said, "I want these guys out of here." Even before this, actually just when Mr. Lucassen took over, he said, "I don't want to do business with these guys like that." And he was frightened [Tr. 204] of them. This is what they told him to do and they had every right to tell him he could do that. They had that complete power of attorney to do that, although they deny it, deny ever saying it. No choice.

Mr. Adler. "Mr. Adler..." I said, "...do you recall having a conversation..." I said, "...with Ms. Kreiger, who is the general counsel for the union in Washington, D.C., concerning this loan?" and I gave him the date. And I told him I had a memo here from her desk, okay, where there's

quotations about, "We acted real bad in Jacksonville." Do you recall that?

I said, "Did you tell that to Ms. Kreiger?" He goes, "Not me."

I said, "Are you saying those are her words?" "Yep, must be her words, I don't talk like that."

Right. Right. He doesn't talk that. He lied. He knows darn well, common sense tells you some woman lawyer up in Washington is going to write that down in quotes when she's talking to Adler? Because that's the same language he told Mr. Neder, he said, "I don't care what you do, just put a f-ing invoice in there and we'll straighten it out later." Okay? You can believe that happened a lot better than you can believe that this lady attorney up in Washington put in quotes, "We acted real bad here in Jacksonville."

That was Adler talking. He admitted he had a [Tr. 205] conversation with her, but he said, "That wasn't me, that's her." He lied. A bald-face lie. We know why he lied. Okay? Because I went further. "Wait a minute, now, you can't get on this stand and confirm what Mr. Neder said, can you, because you're being sued by the union, and that would be an admission and you'd lose." He had no answer for that, but we all know the answer. The answer is, "Yeah, I can't."

But you can't sit here and lie and lie and get away with it. You can't get around the fact, also, that he had a motive. And we also know that Mr. Neder was getting pretty concerned, he wasn't going to get the other seven -- by the way, they had negotiated, Michael Loyd told you that, for twenty-one million dollars originally -- that he wasn't going to get the other seven million dollars. Okay? The union just was getting out of the real estate business. They said that. That was the decision, policy decision they made -- so Mr. Neder

wanted some assurance as to what had transpired, so he asked him to write him a letter.

On April the 19th, he wrote him that letter, and it said in that letter,

"As registered investment advisors for the United Brotherhood of Carpenters and Joiners of America, we have reviewed and researched your request for additional funding in the amount of seven million dollars in the above mentioned subject..." -- which is Reddie Point -- "...and [Tr. 206] find it to be in accordance with all prudent principles of lending."

Okay, "We have reviewed and researched your request."

"Our experience with Neder Properties has been favorable to date and we look forward to working with you on this matter."

Okay, they're looking also to find another seven million dollars elsewhere because they couldn't do it.

Reviewed and researched -- okay? -- Mr. Neder wanted some kind of assurance.

Now, you ask yourself, why would Adler and Burns and Empire Consulting want Mr. Neder to stay afloat for ever how long? And the answer is simple, because Exhibit 76 tells you why, because they were billing Mr. Neder three and a half percent of the draw money, $28,000 on that draw. Okay? They said they never received a dime from the union, they never received -- they weren't making any money on this. Here's an invoice, ladies and gentlemen, dated March 23rd, 1988, almost a year after the loan was in effect -- they were milking Mr. Neder, they were milking the union, that's what they were doing.

Now, I asked Mr. Willertz, over here, I said, "You know..." I said, "...did you ever think about what's going on there between Burns and Adler?" And he says, the man who's suspicious of everybody and everything says, "I had no [Tr. 207] reason to believe that they did anything criminal."

Let me tell you something, ladies and gentlemen, I'm no FBI agent, never will be, never have been, no investigator, but I'm stationed in Washington with the Labor Department, I know it's a lot easier to walk -- Washington's not that big of a city -- to walk over to the union headquarters, perhaps, and ask a couple of questions than to fly down here to Jacksonville -- okay -- and tell me that this man's a criminal, that he did something criminal. Why doesn't he ask the union what they think. If I can find evidence that the union is dissatisfied and they're accusing them of stealing 1.5 million, the U. S. Government can't do it?

They don't want to hear that. They want you to believe what you have to believe, one hundred percent Adler and Burns, before you can convict Mr. Neder of anything illegal at Reddie Point, because they had the power. He told you they told him what to do, and even if it's wrong, morally wrong, it's not illegal, because they could tell him to do that and they had the power to change it.

That, ladies and gentlemen, is what happened at Reddie Point. Mr. Neder, not on his own, decided that he was going to put in false invoices, inflated invoices, okay, and get audited -- because, don't forget, they did come down a couple of times, they came down in October, they came down a couple of times.

[Tr. 208] When you -- Mr. Kunz says, "Well, they can't see if there's any pipe under the ground." When you spend twelve or thirteen million dollars and nothing is changed, a red flag has got to go off. No red flags went off in their

brains. They didn't complain to anybody because they knew exactly they gave Mr. Neder permission to do that.

Use your common sense.

A practice that they were doing, and now Mr. Neder wasn't doing it for the same purposes that they were, he was waiting for the additional funds to come down. And Mr. Moore told you that. He said, "Yeah, we kept a running -- matter of fact, it was in a memorandum of Mr. Moore, I believe, in evidence -- right here, Defense Exhibit 81, where Mr. Moore says, this is the status of all those invoices, this is how much we have to -- we have to pay it back, and as soon Burns or Adler find the money somewhere else we'll pay it back, he said.

I said, "Mr. Moore, did you and Mr. Neder always talk about paying it back?" He said, "Constantly." That wasn't a method to steal the money, keep the money. They had every intention, they had this structure to pay it back. That's an idea that Burns and Adler said should happen, not Mr. Neder. If you can't believe Burns and Adler, you must acquit Mr. Neder on Reddie Point, just as you must acquit him on Greyhound, unless you can believe Phillips and now [Tr. 209] Adler and Burns one hundred percent, because if you only believe them nine-eight percent you've got a reasonable doubt, and the Judge will tell you if you have a reasonable doubt you must acquit the defendant. Not you may, you must; that's how the system works. It's that severe. That burden is so heavy, ladies and gentlemen. Mr. Neder did no wrong at Reddie Point. All the counts regarding Reddie Point must be acquitted unless, and only unless, you can buy Adler and Burns one hundred percent.

That power of attorney, ladies and gentlemen, that allows him to rewrite his Bible and make him God for all practical purposes, is Defense Exhibit No. 10. Read that and

see how absolute that is, the power these people gave him, this union gave him. Read it.

And originally Mr. Anderson had this power of attorney, and Mr. Adler didn't want that, Mr. Anderson testified. We want it, we'll take it from Anderson, who's Anderson, some Florida lawyer down there who was once in an adversary position with the union. No, we want it, and they had it. I'm sure they had it in all the other projects, seventy million dollars that they were responsible to the union.

And they also told Mr. Neder when Mr. Neder questioned them about the practice of doing that, "Well, that's what we do with the Carlisle Group in Baltimore." How would Mr. Neder know that unless they told him that. Make it up [Tr. 210] himself? Unh-unh. That's what they were doing, and they were doing it for their own greed. They were milking two people, the union and Mr. Neder.

Now, you say, well, what if the union didn't give Mr. Neder the seven million dollars?

Oh, by the way, ladies and gentlemen, you read these instructions. Remember the Government put in something real thin, we put the whole thing in here for you to read, because they said that supposedly Mr. Neder's construction, Carpenters Construction Company had taken five hundred some odd thousand dollars, which isn't the case; but also in here is the same address and, oh, supposedly they didn't know who Management Constructors were. How can they not know when the invoices -- supposedly Mr. Burns is out there with his eye shades on and they're doing the accounting, realized it's the same address as Mr. Neder, the same people involved, Mr. Freeman, the people that he met here. He had to know. That's a lie.

But also, ladies and gentlemen, you'll find that Mr. Neder had almost four million dollars of discretionary funds in this, in this loan to do what he wanted to do; admittedly, to be used at Reddie Point, but they were discretionary. He didn't have to account for that.

And what was the fall of Adler and Burns?

Oh, and besides, the union didn't give Mr. Neder the [Tr. 211] other seven million because Mr. Burns and Mr. Adler couldn't find some other union to give him the money.

Mr. Neder and Mr. Moore had a plan on paying that money back, and one of them was that they would forego the income from the club. They had a developer's advance budget they could've taken it out of to repay back, and they also had a marketing budget which they could've taken it and paid it back. They had the means of paying it back.

And this whole thing about the archaeological find not inhibiting construction. Now, you use your own recollection, but that man was just here yesterday and he said -- and the first question I asked him on cross examination was, "Sir, did you testify that ninety-five percent of the property was released on the 15th of January?" He goes, "Yeah."

"Then I would assume, sir, that the property was tied up before January." He goes, "Yes, it was."

Maybe the cease and desist order didn't come until May; however, that property couldn't be constructed on at least before January 15th, and after January 15th, five percent of it. I asked him which five percent, I said, "The ones going in?" He goes, "Yeah." Now, that's where we had testimony that patio homes and the single development homes were going. They were the first ones to be scheduled. For all practical purposes, ladies and gentlemen, it was, Mr. Neder [Tr. 212] didn't lie, construction did come to a standstill because they

couldn't build on that five percent on the entrance. He wasn't lying about that.

Then the cease and desist order came in May, then it wasn't released again until the fall, in October. So that property was paralyzed. Nobody is deceiving you about that.

Now, I'm sure there's somebody else you have to believe a hundred percent to find Mr. Neder guilty of this conspiracy, and this fraud that involved inflated land values, and that man is Harry Smith, the great appraiser from the IRS. A pleasant gentlemen who sat up there and told you with a straight face, okay, even though he had no credentials, that he was an appraiser, and appraising is a simple thing. You use one formula; you use it for cemeteries, you use it for hotels, you use it for gas stations, you use it for apartments, condominiums.

Well, ladies and gentlemen, every other appraiser, and especially appraisers called by the Government, and certainly the appraisers who are on trial here, rebutted that testimony. That is garbage. This man doesn't know anything about appraising.

And besides that, think about where he's coming from. Okay? Because attitude is another thing you can consider from witnesses on the stand. Look at his attitude. In all his reports he said, "I'm from the IRS, and we're presumed [Tr. 213] correct." Wow. Tell me that's an unbiased opinion of the value of a piece of property. Tell me who would love not -- who would love going through life with the presumption of being correct, because that's what the IRS does.

The same thing in tax court, John Gay told you the same thing, but we're still correct. Well, that's fine and dandy, maybe it applies in tax court, but not here. This is a criminal court and whether you like it or not, Mr. Gay, whether you like

it or not, Mr. Smith, we're presumed correct, we're presumed innocent. Don't get up here and tell me you're presumed correct, especially when you don't know what you're talking about. And he didn't. And I think that all of us are junior appraisers from all the appraisal testimony we had, and we all know that everything Mr. Smith said is foolish. That's Mr. Harry Smith is foolish.

And what did he do, besides the fact that he says, I'm presumed right and -- I said, "Wait a minute, now, you're with the IRS, right, and you get a call and it's from your criminal investigation division, right? Now, your job working for the IRS..." -- remember these questions? I said, "...is not to go out there and say, hey, Mr. Taxpayer, you know something, I think you were too modest in your deduction of that gift that you gave, I'm here to appraise it to make sure that you're able to take a bigger deduction." I said, "That's not what you're going out there [Tr. 214] to do, is it? That's not your mind set." "No, not usually, it's the opposite." It's the opposite.

I said also, I said, "You got a call from your CID division, what is the CID division?" He goes, "I'm not sure what it stands for."

I said, "Doesn't it stand for criminal investigation division?" "Oh, yeah, I guess you're right."

Now, think about it. This is an IRS agent, appraiser, and like all IRS people they presume they're right, who's going to go out now and value some property for a criminal investigation for the Government. You tell me that this man is not going out with an attitude? He's going out with a fair and open mind? Give us a break.

I said, "Sir..." -- I said, "...you know, these people are accused of giving false appraisals and lying." I said, "Now, would you do anything like that?" He goes, "Of course not."

"Well, you know, why would you think..." -- and he said, "Well, you know, I don't know..." he said --

I said, "How about the people you called up?" Remember that conversation, I said, "You called up to find out whether or not a marina was a feasible thing." I said, "How did you do that?" "Well, I called people who owned marinas."

I said, "You did, hunh? You said, 'Hi, I'm from the [Tr. 215] IRS, how's business?' Right?" I said, "What did you expect them to say? I was too modest last year, come and audit me or expect a big, big check this year?" Of course not.

When people talk to government agents, I don't care if they're IRS, FBI, Labor Department or anybody else, it's only natural you're concerned.

Now, Mr. -- and you know, I --

And then I said, "Well, you know, how did you know whether they were telling you the truth?" He goes, gratuitously he offers this, "Well, that's between them and their Lord."

Now, ladies and gentlemen, I've heard the Lord's name used in conjunction with the IRS but not in that context. Okay? And it shouldn't be done.

So why did he say that? Was he over there trying to tell you, puts his hand on the top of his head and tells you what a religious person he was? Was that what he was trying to do? Well, if he was, that's pretty cheap, because ladies and gentlemen, the Lord has nothing to do with the IRS, and probably would never approve of the IRS.

But in any event, he protested too much, and he didn't know what he was talking about, and I'm sure the attorneys for the appraisers will deal with that issue in greater detail.

But Mr. Kunz said something very, very interesting. He [Tr. 216] said, "In order for Mr. Neder's scheme, for his plan to have worked, he needed cooperation of criminal appraisers, bogus appraisers."

Now, if we follow that logic, in order for you to find Mr. Neder guilty of anything -- and I think that's what Mr. Kunz was trying to get at -- you have to find the appraisers guilty. Well, I suggest to you, ladies and gentlemen, there's no way that anybody can find these appraisers guilty of anything, and if they're not guilty of it, then Mr. Neder's not guilty of it, if you follow Mr. Kunz' argument and his logic.

There isn't a shred of evidence to say that these appraisers were bogus.

Harry Smith, you took notes on this, go back and apply Harry Smith's principles. Think about what he testified to. And I agree in order to find Mr. Neder guilty you have to find them guilty and there's no way that they're guilty of anything.

For this scheme, for this conspiracy to work, you have to have inflated property, do you not? Well, we know at Southern Grove there's no question, even though it was appraised twice the value, nothing wrong with that, so we know that property can be appraised for twice the cost and not be a criminal act. Therefore, if they've done nothing criminal, then Mr. Neder certainly hasn't done anything [Tr. 217] criminal.

Well, this is a criminal case. What's a criminal case about? It's about -- when you talk about fraud and theft, it's about stealing. The appraisers went under the same scrutiny as Mr. Neder did, by IRS, Labor Department, and everybody else, every agency you can think of. Did you see any evidence of pay-offs? I mean, why would somebody commit a crime, put their reputation on the line? For their regular fee? Of course

not. You've got to be a moron. You heard from both of them, they're not morons.

Okay, that's where the Government's case is at fault. There's nothing phony about the appraisals that Mr. Neder got from those people. And the fact that Mr. Neder asked them what they thought the worth was, that Mr. Neder suggested what he thought the property was worth, there's nothing wrong with that. It would be unbelievable if a principal, somebody who owned a piece of property, didn't suggest -- who wanted to have it appraised, didn't have an idea or didn't tell the appraiser what he thought it was worth. There's nothing illegal about that. Nothing at all. It's quite common, the unusual thing, if he said, "I have no idea what it's worth, you tell me." Of course not.

For that, people go to prison? I should hope not.

Now, these appraisers of these properties, okay, and there's like maybe ten parcels we're talking about, are not [Tr. 218] the only properties that Mr. Neder looked at. He looked at a lot of property, okay, but they weren't the kind of property that had the kind of bargain value that he found. He looked at thirty, fifty, a hundred pieces of property over that period of time. The fact that he limited it to ten pieces of property that were being sold a lot cheaper than what they could be appraised for and developed for, is not unusual.

If you bought thirty pieces after looking at thirty pieces, maybe. But he testified, he looked at a lot of pieces. He had discussions with appraisers all the time on property he may look at. There's nothing wrong with that. They're appraisers, you can talk to them and ask them what they think. And supposedly telling him that he found this piece over there, somewhere where The View is and that there's another piece that sold there for approximately that, and what do you think, is that telling him you've got to give me an appraisal for this price? No. He

says, what do you think? He's asking him for a suggestion. You can't read more than that into it.

So that letter from Mr. Neder is certainly not the letter that aids and abets anybody to give a false appraisal. They're asking -- he's asking for an opinion.

THE COURT: Do you want to take a break here?

MR. FALLIS: Sure.

[Tr. 219] THE COURT: Okay. Ladies and gentlemen, why don't we take a ten minute recess.

Don't discuss the case amongst yourselves, and keep an open mind.

(Recess 4:00 p.m.)

THE COURT: I want to see the lawyers.

THE CLERK: You want to see them at sidebar?

THE COURT: Yes.

THE CLERK: Counsel, would you approach sidebar, please.

(At the sidebar.)

THE COURT: How much more time do you need?

MR. FALLIS: How long have I been on?

THE COURT: An hour and twenty minutes.

MR. FALLIS: Really? About another hour.

THE COURT: Okay, so that means you won't go today. We'll let him finish.

Okay, we'll stay until you finish.

MR. FALLIS: Sure.

(Recess 4:01 p.m.)

(Court in session 4:09 p.m.)

THE COURT: Mr. Makofka, you want to see if the other defendants are coming in?

All right, bring the jury in.

(Jury present and court in session 4:12 p.m.)

[Tr. 220] MR. FALLIS: Ladies and gentlemen, the prosecutor made a big deal about the fact that Mr. Neder bought a Porsche, a used Porsche, by the way, and he had given his daughter the car, and it supposedly came out of the funds of Reddie Point.

Well, ladies and gentlemen, if you'd read -- I hope that you would -- okay? -- the schedules in here and the agreement, you'll see that Mr. Neder had a 1.2 million dollar developer's discretionary fee, something that he was entitled to. It doesn't say that you can't use it for your own personal use.

Don't forget what the Labor Department told you, we're not accusing him of stealing the money, we're accusing him of diverting it. Okay? There is no law that says he can't divert money that he borrowed. None. That's not a crime. It might be, as I said in the beginning of my closing, cause for a civil action of negligence, breach of fiduciary, but it's not fraud, and it's not a crime, he's not charged with that. Just keep that in mind.

Now, we just finished talking about Mr. Smith from the IRS, and there's one other fellow we need to talk about from the IRS, and that's Agent John Gay.

Once again, ladies and gentlemen, the IRS has got an attitude. They give them that attitude because they're told they're right and everybody's wrong, it's an us and them [Tr. 221] kind of attitude; and you, Mr. Taxpayer, are wrong until you prove yourself right.

Don't forget, in order for you to find Ellis Neder guilty of the tax counts you have to conclude beyond and to the exclusion of all reasonable doubt that when he took these loans out, number one, he had no intention of repaying them. Now, that simply just doesn't hold water, given the evidence. Not when somebody takes that money and invests it back in business, back in business, signs for it personally. That was the whole point. Of course he intended, at the time he took those loans, to pay them back. In other words, he had that criminal intent when he signed that loan application, I'll just take this money and I ain't going to pay it back. Okay? Nothing -- this evidence does not dictate that kind of conclusion. Nothing says that. The opposite is true.

He built an organization. Somebody who's looking to steal and defraud doesn't do that. Why should he spend a million dollars on payroll? Why should he spend so much money on architects? You only -- you saw a fraction of the plans that went into this development. Ms. Ray gave you a chart and showed you where this money went. It didn't go into Mr. Neder's pocket, it went back into the projects. So his intent, you can deduce his intent from what he did with those proceeds.

[Tr. 222] Sure, there were excess proceeds. Now, this circular reasoning, this hypothetical who-knows-what that only the IRS can think of -- okay? -- because you're going to use your common sense, how can there be profit on borrowed money? There can't be, you owe the money; unless you're released of it, then there's a profit. And if Mr. Neder and the

nominee are one and the same, and he sells it to himself and he borrows the money and guarantees it, where's the profit? He's got to pay it back.

Yes, there is a profit if he turns around and sells it again and makes a profit on it -- but that didn't happen in this case -- or, once he's constructed the project and he sells it off. That's common sense.

And, you know, Mr. Kunz said, well, Mr. Brooks said if this happened, this happened and this happened, that it would be profit. No, that's not what he said.

On cross examination, Mr. Kunz gave him a hypothetical, he says, "Well, if he was planning on not giving it back at the time, would that be taxable?" He said, "Of course, it would." We're not arguing with that, because that's not what happened.

What Mr. Kunz told Mr. Brooks was his theory of what happened, that this is a fraud. Then of course Mr. Brooks, being an honest CPA, said, "Yeah, of course it would be," because he knows §61 as well, of the IRS Code.

[Tr. 223] So that is circular reasoning and smoke thrown at you to make you think that there was a profit. There ain't no profit, you walk away with a profit. You pay back loans, and until that loan is released or discharged there's no profit. Did anybody discharge Mr. Neder from those loans? Of course not. Some took their property back and some sued for the balance, we know that. Nobody discharged him from that obligation.

Another thing, why would you put everything you have on the line as a personal guarantee. You remember with those loan officers we went through all the reasons they gave Mr. Neder the loan. Okay? Personal financial statement, reputation, value of the property, and everything else. Okay?

But they all said, but if we knew that the property was bought for less we never would've done it.

Baloney, they gave five good reasons for giving that loan, and that's why they did, and that's why he took it, not -- not to deceive them or defraud them, or line his pockets because, ladies and gentlemen, again, common sense, Mr. Neder would not have thirty-eight dollars in his pocket last week if he was out to defraud and steal. Any idiot could've walked away with this with a lot of money, any thief could have; but only an honest person, who had no intent to defraud, would've come out of this thing broke; and he testified and it's unrebutted, that he is broke.

[Tr. 224] Talk about the IRS again. John Gay got up here and said -- and the Judge will tell you -- think about the demeanor of the witness, any stake in the outcome, that sort of thing. What did John Gay tell you? He sat here, "I looked into all the evidence and I concluded in my expert opinion he tried to defraud; therefore, it's taxable income." Think about that. And when did he make that statement to you? In the Government's case before he heard one shred of evidence from the defense.

Is that an unbiased, expert opinion, when you hear one side of the story and you conclude it before Mr. Neder got on the stand, before Mr. Brooks or anybody else got on the stand to say what they think happened? Are you going to take that opinion and buy it? I should hope not, because you took an oath that you'd listen to both sides of the story.

He didn't have to because he's from the IRS. He's presumed right. He's told you that all the time, that in his expert opinion after hearing half the story, Mr. Neder's guilty.

And now the Government's telling you, this is my expert over there. He's right. What? When he heard half of

the story? No. He's prejudiced, he's biased, he's got an attitude; and the best, the best tale-telling sign is the last thing he said, "I never lost one." When I asked him, [Tr. 225] "I never lost one." Well, ladies and gentlemen, to me that's a challenge and I believe a lot of Americans would love to take up.

I don't know if he's ever lost one or not. That's what he says. But this is one that he needs to lose. He needs to lose this one, ladies and gentlemen, because he gave an opinion without hearing all the facts, only what Mr. Kunz told him. Without hearing from Ms. Sprague, without hearing from Mr. Brooks or anybody else. So you know what you can do with that opinion, you can take it and toss it in a pail because he didn't have the whole story to judge it on. And that's what the Government wants you to find him guilty on, one man's opinion who heard half the case.

You can't do that. You've taken oaths not to do that. You promised you would listen to both sides of the story and come to your own conclusions. You didn't say, I'll sit here and after the Government's case I'll make up my mind. You didn't say that. So anybody who does sit here after the government's case and makes up their mind, their opinion is worthless to you and you shouldn't even consider it.

Use your common sense. How do you owe taxes on the money that you owe? It's just simple, as Mr. Brooks said. You get a second mortgage. It's worth more than you paid for it, you get a second mortgage. Do you owe taxes on that second mortgage? Of course not. It's the same principle, [Tr. 226] it's exactly the same principle. And all these hifalutin accounting principles mean nothing if your common sense tells you that's impossible; and what's more important than that, if you think that that's wrong. Because as I said, ladies and gentlemen, you're the most powerful people in this courtroom.

You don't take your orders from them, you don't take your orders from anyone.

You're here to make sure that this Government doesn't run amok and convict innocent people by sheer use of their power, and it's awesome.

Think. You've been sitting here. Think of all the people you saw sitting at this table during the course of this period of time, think about it. All the agencies. That's awesome power against one defendant with one lawyer.

You know this whole thing about Mr. Neder having money, supposedly he had money off shore to hire a lawyer, we know that's nonsense, because if that were true you wouldn't be looking at the likes of my cousin Vinnie over here, you'd be looking at F. Lee Bailey or somebody. Okay? We know that. So that's completely untrue. That was just something that was thrown out there just to put in the back of your mind. Well, they couldn't back it up, ladies and gentlemen, there is no such person and Mr. Neder never made that comment. It's just me and Mr. Neder against the United States government, ladies and gentlemen, and your job is to level [Tr. 227] that playing field, to make sure that that awesome power, that isn't abused.

That the thing that our founding fathers were so concerned about doesn't happen, that that power becomes so arrogant and so absolute that private citizens can't even fail in business without being accused of a crime.

There was no crime, ladies and gentlemen, in any of these transactions.

Now, you will have to believe somebody else, ladies and gentlemen, somebody that the Government wants you to believe half the time and not, the other half time not to; but they're not sure what part they want you to believe yet. I guess

maybe Mr. Kunz will get back on in his rebuttal and tell you what part. And who is that? Tom Turner.

Tom Turner, and I'll tell you, ladies and gentlemen he looked like an angel, looked like a choir boy. He is the Government's key witness, numero uno. And who is he? Mr. Kunz asked him, "Mr. Turner, did, in everything you said here did you tell the truth?" "Yes, I did." Well, Mr. Kunz wants you to believe some of what Mr. Turner says. Okay? He probably wants you to believe all of it.

Well, who is Tom Turner? Tom Turner is an admitted thief, okay, and an admitted criminal. Okay, that choir boy pled to a crime that had absolutely nothing to do with Ellis Neder. Nothing. Remember I asked him about that, I said, [Tr. 228] "This Mallard Landing thing, remember that?" "Yes, yes, I pled to that." "And you pled to one other thing about a false statement." That thing, remember it didn't have a thing to do with Ellis Neder -- okay? You can't believe Tom Turner. As well as he was rehearsed, you can't believe him, he's an admitted liar. And I'll tell you why you can't believe him.

The Court will read you these, you'll take these instructions back with you. These instructions -- and I've referred to them before -- will tell you what to do with Tom Turner's testimony, and I'll show you. Not only -- I'll tell you where he came back and he did lie to you again and I'll prove it to you -- but this is what the Court's going to tell you,

"The testimony of some witnesses must be considered with more caution than the testimony of other witnesses. In this case the Government called as witnesses persons named as a codefendant or accomplice in this indictment with whom the Government has entered into a plea agreement, providing for the dismissal of some changes and/or less sentence than the witness would otherwise be exposed to for the offense or

offenses for which he or she pled guilty, or has been granted immunity.

"Such plea bargaining is proper..." -- okay, there's nothing against plea bargaining -- "...however, a witness [Tr. 229] who hopes to gain more favorable treatment in his or her own case may have a reason to make a false statement because he or she wants to strike a good bargain with the Government.

"So while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses."

Now, ladies and gentlemen, that's -- that is the biggest caveat. That's like crossbones on a bottle. I suggest to you that testimony is poison.

And you remember in cross examination I said, "Mr. Turner, the day's going to come when you're going to be standing here with Mr. Kunz here, your lawyer over there, and you're going to be before some Judge for sentencing, and your agreement with the Government was that they're going to get in your corner, they're going to say what a great guy he was, he gave great testimony, he's rehabilitated, Judge, go light on him," something to that effect. He says, "Well, I don't know if that's going to happen."

It's right there, it's a plea agreement. He's a lawyer. It's a contract, he read his plea agreement. He can play cute all he wants, he knows darn well that's what's going to happen.

Now think about it. Mr. Turner was charged in forty-three counts, looking at two hundred years if convicted. Okay? And what did the Government do? They threw out over [Tr. 230] two hundred counts (sic) and let him plead to three counts. Let him plead to three counts. Threw out a couple hundred years worth.

Now if the Government -- and he was charged basically in the same charges that Mr. Neder had, it was the same charges except that Mr. Neder probably has more charges, the indictment will show; however, the Government just threw out those counts. No asking. What does it say about those charges in those counts? One or two things, and either one of them is very relevant to this case.

Number one, that the charges in that indictment are bogus, inflated, because they can put anything in the charge, they can charge anything they want, they've got that power -- okay? -- and they, the Government is not convinced they can prove it anyway. Now, if that's true, then the same thing holds true for the charges against Mr. Neder. If the Government can so easily throw away, throw away forty counts and a couple hundred years worth of penalty, what does that say about that indictment and those charges. They've got to be bogus.

It also says something else. The Government didn't just do that, they created a fiction with Mr. Turner, and they said that your criminal activity stopped on November 27th. Do you remember the significance of that? Because that makes him eligible for parole. After one third of his [Tr. 231] sentence he can go out on parole because of that fiction, which means even if he gets the maximum, the maximum, which is probably doubtful if the prosecutor's going to be in his corner, then he gets fifteen years. He could be out in five years. Okay? That's a heck of a deal.

And I suggest that Mr. Kunz tried to tell you that maybe some of our witnesses, who are, quote, being paid, would taint their testimony – okay -- because they were getting paid. You could buy a lot of testimony for freedom, or the threat of making somebody sit through this ordeal for ten weeks wondering what twelve people are going to think. The agony. You can buy a lot.

Mr. Kunz suggested that somebody would say that -- mentioned something about the Lindbergh case. I suggest to you that Mr. Turner, at the request of Mr. Kunz, would say that Mr. Neder killed Kennedy, he saw it with his own eyes, both of them, okay, for the kind of treatment that he's going to get. Think about it. That's awesome power, isn't it. And that's what's happening here. Awesome. And you're here to prevent that from happening. You are the twelve people who check the system.

So you have to believe one of two things, or believe both of them. The counts are bogus, the Government brought them to coerce people; or, he got himself a great deal, which, if you follow the Judge's instructions you've got to [Tr. 232] consider. Okay?

Now, it wouldn't be so bad if he did get on that stand -- and don't be deceived by that choir boy look, because you know what he is, I just told you -- and he did say, well, I saw, I saw the light, I'm rehabilitated now, I'm going to sit up here, Mr. Kunz, and testify truthfully against Mr. Neder; and he did. But he didn't, he got up on the stand and he lied and he lied again. However, you can't fool everybody all the time.

He probably, he probably would if he was better prepared. I asked him, "Did you review a whole bunch of things for the Government? Did you go through ..." "Yeah, I looked at this, at this stuff." I looked, I looked, I looked, I looked. Boy. And don't you remember Mr. Kunz asked him, "Well, you know, were you a retained lawyer?" "No, I wasn't a retained lawyer, strictly job specific stuff I did for Mr. Neder."

I asked a whole bunch of other questions. "Retained lawyer? Did you ever give any tax advice?" "Never did." This and that and the other thing. Okay?

You know something, he lied, and he wasn't good at it because in his rehearsal what he failed to do, ladies and gentlemen, is look at the bills. Okay, he might've looked at all this other stuff Mr. Kunz asked him to look at, but these bills are what we put into evidence. He didn't review [Tr. 233] these bills.

Remember I said to him, "Sir, if you say you're not a retained lawyer, well, what if I tell you there's a four thousand dollar retainer?" "No, no such thing."

"How about a twenty-nine thousand dollar?" "Never had a twenty-nine thousand dollar retainer."

Well, ladies and gentlemen, English just might be my second language, but I can read twenty-nine thousand dollar retainer on a bill, and so could everybody else here.

"Did you ever give tax advice?" "No."

"How about where you billed him for four and a half hours telling him how to do a tax free exchange, that's not tax advice?" And then plain stupid saying that there are no tax ramifications in doing big real estate deals. Now that really stretches the imagination. Who's going to go to a lawyer to do a big commercial real estate deal who doesn't know anything about taxes, and pay him top dollar for the time, $125 an hour? No one.

These bills contradict every single thing he said on that stand. He said, "I never got involved with Mr. Neder's day-to-day activities. He only came to me for job specific kinds of things, foreclosing."

Well, ladies and gentlemen, if you do nothing else, because Mr. Turner is a very, very big witness for the Government here, you've got to believe him. You've got to [Tr. 234] believe him to convict Mr. Neder of anything,

because if Mr. Neder took his advice in good faith, Mr. Neder's not guilty of anything, anything in this indictment. If you pick up not one other shred of evidence, you've got to deal with Tom Turner. Pick up his bills and see what he billed Mr. Neder at. Look at the retainer fees. Okay?

He also said, "I didn't get involved with Mr. Neder until Southern Grove, which I believe was in 1985, the first time I ever got involved." I'm sorry, ladies and gentlemen, he was involved with Mr. Neder in 1983, with Rose Creek. asked him about that.

He also said, "I knew nothing about Mr. Neder's nominee agencies." He formed them. The corporate books were in his office. He said, "Well, they were only there for a short period of time." No. Donelan, all these people, they formed these nominee corporations, the ones that Horace Marsh and Mary Kerr and those people were on, they formed them. Now, common sense. And they charged Mr. Neder for forming those nominee corporations. Now, how could he tell you with a straight face that he thought Mr. Neder had no affiliation.

How about this thing about giving Mr. Neder the net proceeds? Okay? These checks for $350,000, $900,000, to go give to somebody else. Ladies and gentlemen, that just doesn't happen. He's the closing attorney. He's going to [Tr. 235] give somebody else's money to Mr. Neder when Mr. Neder has no relationship with them? You got to be pretty stupid, but I suggest to you he's not stupid, he's sly as a fox.

But that's what Mr. Kunz needed him to say, because he knows that the law says if Mr. Neder in good faith, in other words on reliance of his attorney, did all these things he did, he's not guilty. So Mr. Kunz wants to have it both ways. You understand that? But they didn't do their homework. This

impeaches every single thing he said. They didn't do their homework. They got caught. Okay? Understand that?

You don't go to jail for picking a lousy lawyer, or even a corrupt lawyer. You go to jail for having the intent to commit a crime. That's why Mr. Kunz wanted Mr. Turner to say that he didn't have any day-to-day relations. When we were talking about the nominees, it was a big surprise to him. How could it be when he formed them? How could he be not involved in the day-to-day conferences? How could he not be a retained lawyer when any of Mr. Neder's employees could pick up the phone and talk to Tom Turner and Tom Turner bills him for it?

Common sense. What employer, unless you have retained counsel, is going to allow employees to do that? What lawyer would do that without permission from the client unless he has a retainer? You can't have it both ways, but [Tr. 236] that's what Mr. Kunz wants you to believe. He wants you to believe that Mr. Neder fooled Tom Turner. Who orchestrated the whole arrangement? Where he got his information from.

And also the conversation, "Did you ever meet Mr. Brooks?" "Might've met him in overlapping meetings but never had any ..." I said, "Wait, do you know him personally?" He said, "No, I don't. Had some conversations." What do you think they were talking about if they weren't talking about Mr. Neder's taxes and Mr. Neder's business? Of course that's who they were talking about.

He wrote letters to Horace Marsh -- okay? -- regarding a refund from the State on First Frontier and he billed Mr. Neder for it. He had status conferences with Mr. Neder, went to meetings with Mr. Neder and his staff. He gave general advice, not job specific advice.

And those forms, these affidavits, he drafted them. He admitted to changing the punctuation because his handwriting was on it, but he drafted both of them.

Mr. Kunz doesn't want him to say that because if he drafted them and Mr. Neder relied on his advice, these are not untruthful statements, Mr. Neder walks, because he in good faith relied on the advice of his counsel. Do you understand that? That's why his testimony is so awkward, because he wants it both ways and he can't have it both ways. You believe him or you don't believe him.

[Tr. 237] I say don't believe him because for two reasons. Number one, when the Judge tells you to view his testimony with great caution, and this is the caveat, read these bills, you'll see what the relationship was. Defendant's Exhibit No. 20. Read them, you'll know that this man lied through his teeth, that choir boy. He tried to please Mr. Kunz but he got caught, and so did Mr. Kunz, inadvertently.

I'll tell you something else interesting. Mr. Turner supposedly said that these were all arms length transactions. Okay? He was the closing attorney and he thought that Mr. Neder had nothing to do with the nominee corporation.

Now, what was happening? We have simultaneous closings here. Okay? And there were loan proceeds, and those loan proceeds would go to the seller. Correct? That's where they're supposed to go, then the excess would go to Mr. Neder to give to the seller, supposedly, because he didn't know that there were agents. Okay?

Well, it's too bad, Mr. Turner, because the evidence shows differently. The jury can't buy that. You need to look only at -- there's one, two, three -- eight different closings: Southern Grove, River Creek, Beach Harbor, San Sebastian, The View, Stokes Landing, Belle Rive and Reddie Point.

Those are eight -- oh, by the way, Reddie Point, we asked him where the million dollar down payment was and he [Tr. 238] goes, "Gee, I don't know, I must be missing a document somewhere." Ain't no missing document. Okay?

If you look at those loans, if you look at Government's Exhibit No. 48, which is the ledger, for the closing at Southern Grove, you'll see that certain expenses -- okay? -- like attorney's fees, title insurance, two title insurance, Clerk of the Circuit Court, three different, over ten thousand dollars -- okay? -- of costs. Now listen to this: Of the borrower, because that's what it says in the contract, these will be costs to the borrower -- they're listed here in Government's Exhibit 51 -- okay? -- were taken out of the proceeds of the loan. Think about what this means.

He took the borrower's costs out of the seller's net check. He did it eight times. Eight times, ladies and gentlemen. If these were arms length transactions, two separate borrowers, like he'd want you to believe you thought they were, why would he charge the seller all the costs of the borrower and net it out. He says he didn't know what netting is. Of course he does. You need to look at those exhibits. Look at the ledger card, which is Government's Exhibit -- this is just for Southern Grove, Government Exhibit 48; the closing statement, Government Exhibit 51; the contract, 41; and 49, which is the excess proceeds, and you'll see each and every time. And River [Tr. 239] Creek, Government's Exhibit 98, which is his general ledger out of his law office, where he has all the costs that according to the contract are supposed to be charged to the buyer -- okay? -- taken out of the seller's proceeds.

He didn't do his homework, he did it eight times. So he can't come in here and tell you, tell you the truth, that these are, he thought these were arms length transactions, he didn't

know these were agencies, because then he would have to explain why did he charge the seller. The seller is supposed to get the proceeds, why did he charge the seller all the borrower's costs if that were the case? Because it isn't the case, they're one and the same, and he knew it.

What's significant about that, ladies and gentlemen, he lied to you again, and he got caught red-handed just like with his bills -- just like with his bills. I don't think there was any accounting background, it doesn't take much.

Look at those exhibits, ladies and gentlemen, they speak for themselves.

Anyone, any closing attorney who charges the seller the buyer's costs, unless they're brothers and sisters and they're just friends -- I mean we're talking about costs, twenty, thirty, forty, fifty thousand dollars -- he gives the net proceeds back to the buyer again, has got to be a lunatic for you to believe that he didn't know that they were, that they were related parties.

[Tr. 240] But you know something? That's how the Government wants him to testify, that's how they want to stretch, stretch the truth. Because, like I said, if Mr. Turner got up there and said, "Yeah, that's how I did it, that's how I advised Ellis Neder to do it," Ellis Neder is not guilty because he acted in good faith on a representation of his lawyer. That's why the Government needs you to believe him half the time and not the other half of the time, because they need him to build the case against Ellis Neder. But unfortunately, it ain't going to work, you people happen to be too smart for that.

You can take everything Tom Turner said and toss it, because he's a liar, an admitted one, and he's an admitted thief. And he came in here, after standing in front of here and taking that oath, and said, I will tell the truth, and he told a bunch of more lies.

Not because I say they're lies, the evidence tells you he's lying. The bills are here. These bills were created back in 1985 and 1984 and 1983. Okay? He was involved -you look at some of those -- as far back as Rose Creek, Cedar Creek. He wasn't the closing attorney, I mean Bill Joos was the closing attorney. Okay? And he said, "I don't know anything about netting, he never heard anything about netting. He gave one check at the end after he taxed, quote, the unrelated party, be it Horace Marsh, Mary Millis, [Tr. 241] whatever -- okay? -- Mr. Neder's costs, which don't make sense. He netted it out.

He says that Mr. Neder never brought any checks to the table. Mr. Neder has brought checks to the table, he testified to that. The fact that he never used any of his checks because Mr. Turner decided to net it out is something else, but he was prepared to do it.

When somebody goes to a lawyer, even if you're a lawyer yourself -- okay? -- you go with the expectation that you're going to get the proper advice, and if you want to do something that isn't right, that lawyer is going to say no, you can't do it. This lawyer didn't, Mr. Turner; he said, yeah, you can do it, and this is how you do it. And he told him how to do it.

Did he ever tell Mr. Neder that this was illegal? No. He told Mr. Neder this was how they play it. I'm a real estate lawyer, I deal with banks all the time, this is how it's done, and he gave him the formula. He told him, that's how you do it.

Mr. Neder was at his tax, at his accountant's office, and he said specifically -- remember Mr. Brooks? -- he said, "Give me an extra copy of the 721 so I can bring it back and make sure Tom Turner is doing these things properly." Okay? And he brought it back to Tom Turner, and Tom Turner didn't know anything about it. That's probably why Mr. Neder is in

[Tr. 242] trouble today, but that's not Mr. Neder's fault. He went to a lousy, as well as a stupid and corrupt lawyer, because that's what he is.

And why would he do that? Well, I suggest to you, ladies and gentlemen, $200,000 worth of fees in a couple of years is not peanuts. Now, I'm not saying they were exorbitant fees, but it was a good piece of business for giving bad advice.

Like I said, don't forget, he committed a crime that had absolutely nothing, nothing to do with Ellis Neder. If Ellis Neder was in cahoots with Mr. Turner to commit crimes, he wouldn't be paying him fees. You know how that works, they'd be splitting -- quote -- profits, ripping off banks. But it wasn't Mr. Neder's intent to do that.

That's what your common sense tells you, and that's what you're going to take to that jury room, common sense. The Court's going to tell you to do that.

Ladies and gentlemen, there are some other loose ends that the Government brought up that need to be answered before I finish.

They said that Mr. Neder was trying to conceal Mr. Marsh, Ms. Millis, his sister, from even Mr. Turner. If that were true, and you heard the testimony, why in the world would he bring Mary Millis to the closing table, Horace Marsh to the closing table, where the bankers, their [Tr. 243] lawyers and everybody else could and should be, why would he do that?

Why would he tell Mr. Turner that Mary Kerr is my sister in the underlying transaction if he was trying to conceal something? That doesn't make sense.

Now this other thing about making, the Government is making a big deal about Mary Millis using her maiden name, Rosier, and there's a good reason for it. There was a

discussion -- okay? -- about interoffice jealousy if somebody knew that she was acting as one of his corporations, pet employee, so to speak, that kind of thing. Just as the prosecutor even told you that one of his, one of his employees got really upset that he was using Horace Marsh instead of him. Now, can you imagine what the rest of the office staff would do? So that was the reason Rosier, she used her maiden name. And that was at Caribank -- I mean -- yeah, it was Ms. Doerr's bank, it was a Caribank loan. Ms. Doerr said she knew her. Ms. Doerr could've been at the closing. Was he trying to hide anything at the closing?

And at the closing don't you recall Mary Millis said to Mr. Turner, "Is this legal?" And he goes, "Unh-hunh." What she's doing? How can Turner get on the stand and say that he didn't know anything when the nominee turns around and says, "Mr. Turner, is this thing legal?" and he goes, [Tr. 244] "Yeah." Their witness testified to that. That's absurd.

And you also heard from everybody that worked for Mr. Neder that Mr. Neder never did a thing without running it past Tom Turner. The Government witnesses told you that. That's important.

Why did he run it past Tom Turner? Because he didn't want to be here in 1991 and 1992, that's why he went to Turner. What did Turner do? Nothing.

Mr. Kunz also said that Horace Marsh never signed -- okay -- for the underlying purchase. Well, if you look at Government's Exhibits 35, 36 and 41, you'll see his signature on those contracts.

Now, Mr. Kunz also said, he told you in his opening and he told you again today in his closing, that this was some kind of pyramid scheme. This is not a pyramid scheme. Dr. Fish told you what a pyramid scheme is. Okay? It has

absolutely nothing to do with a pyramid scheme. Nobody takes the money, nobody took the money and ran here. That's what a pyramid scheme is. Once you think you've got enough on top of the pyramid you grab it and you're out of there. That didn't happen here.

He also said, he commented on Mr. Hovde's testimony and he said, "Well, isn't that kind of like hitting the lottery when you can get a purchase price the same as an appraisal?" Mr. Hovde first said, "Yes, it is." But then on cross [Tr. 245] examination we asked Mr. Hovde, "Now, wait a minute, Mr. Hovde, what if the appraisal was already done and somebody calls up..." -- I think the Judge even asked this question -- "...and says, what's the price going to be, he puts it on the contract." That's not hitting the lottery. Of course not. He's trying to make it sound like it's impossible. It's the simplest thing in the world. There was a two -- we heard testimony -- a two or three week lapse, sometimes, between the time the price is arrived at and the actual appraisal goes out. That's what he's going to try to convict Mr. Neder for abetting appraisers on? That's the kind of evidence? Common sense tells you how that happened. More smoke.

He also said that Mr. Neder tried to conceal the first closing. From who? Mr. Turner? There was simultaneous closings, he did them both. That is also not true. You heard it, simultaneous closings, from everybody. The bankers all knew it, everybody knew it was going to be simultaneous closings.

Now Mr. Kunz takes great pride in the fact that he drags the ex-wife down here to testify that there was no land trust in the divorce. But you know something? That was a futile attempt because Mr. Neder, unfortunately for the Government, has been divorced more than once, and we introduced the divorce decree which mentions a land trust, [Tr.

246] the one that he anticipated to do, the Belle Ring deal. That gets nowhere. Look at the divorce decree that we introduced and you'll see that there is, in fact, a land trust, which did happen to deal with property then, but a land trust you can put anything else you want in there as well, you just amend it. And that's what he was referring to.

See, he wanted to say there was absolutely no land trust in any divorce decree. Baloney. The man's been divorced more than once. They should've done their home work, that wouldn't have backfired on them, but they didn't do their homework, just like Mr. Turner didn't do his homework.

Now, also Mr. Kunz said Mr. Neder never, never wrote a check -- okay? -- at the closing, never made any deposits. Well, ladies and gentlemen, I don't know if that's true because in Government's Exhibits 20 and 29 there are closings that were done by a Mr. Joos -- remember him? -- the other attorney, not Mr. Neder, and they all reflect down payments. It wasn't don't by Mr. Turner, this is the one that had to do with Cedar Creek, and they all reflect down payments.

Now, was Mr. Joos also in this conspiracy too? Well, I don't see him sitting at the table, I don't see him confessing to any crimes. Obviously that's not true.

[Tr. 247] Also, if you look at Mr. Turner's ledger card again, you'll see that Mr. Neder at the closing of Southern Grove, wrote a check for $17,793, received from Ellis Neder; so that's not true, they didn't do their homework to make those kinds of statements.

Now, you also heard testimony -- and this is really, really important -- that all the banks, every single lender that came in here, never gave a loan to value, only to cost. You member Mr. Kunz saying that? Without exception, whichever is less. Cost -- okay? -- purchase price as opposed to the value.

Well, that's absolutely not true. Government's Exhibit No. 9 is a commitment -- okay? -- is a commitment for Cedar Creek by Duval Federal. Okay? It says, "Recommendation, approval limited to seventy percent loan to value, for $273,000, subject to a full narrative appraisal." In other words, ladies and gentlemen, they were making this loan, not to cost -- okay? -- so they can't complain about, quote, underlying transaction which have low predicate to value. In this case it was $273,000, which comes out to exactly seventy percent of what the appraised price was for that piece of property.

So that's not true. Those loans, those collateral loans were given, and here the Government's evidence will show you that.

[Tr. 248] Matter of fact, Mr. Neder back on September 5th, '84, when he closed that loan with Mr. Beaty -- okay? -- sent him a letter that says,

"Enclosed find the contract to purchase the additional acreage we spoke about. Please arrange a seventy percent collateral loan as before."

Southern Grove, Financial Federal. $525,000 is the appraised price of the value of the property. Loan term, loan to value, 67% of loan to value. What was the appraisal on Southern Grove that was done by Johnson? Lo and behold, it was 67% of the loan. Now, that's of course, the appraisal they're not complaining about, which is double what the original purchase price was. See, they do admit it might happen, but that was a loan to value. So it does happen, and it was happening. It was happening in that climate and in that atmosphere.

That smoking gun that he talked about, that reservation list that said, "Fake" on it. Well, Ms. King told you those were her words, not Mr. Neder's. There was nothing fake.

How about this deed supposedly Mr. Romano didn't have any authority to give, gave to Mr. Neder? Well, ladies and gentlemen, you do not have conclusive proof that Mr. Romano did not have the authority to give that right of way, that access, because they could've brought Mr. Romano in here or some other evidence other than some guy saying, hey, I [Tr. 249] concluded that he didn't have it. No, this is too serious. Bring me Mr. Romano, bring me somebody else and say that Mr. Romano didn't have and show me he didn't have. Mr. Romano is part of that group that sold that piece of property. You can't go on somebody else's word. Bring me proof.

Did Donelan bring you any proof, show you a document that this man didn't have any, any right to give that? Absolutely not. Absolutely not. That's what Mr. Kunz wants you to think. That's not proof beyond a reasonable doubt. So that's not a false statement. They've got to bring you proof, not that I concluded.

From what? Bring me some documentation to say that this man didn't have a right to give that deed then maybe you can prove that count. It doesn't exist. They didn't give you the kind of proof that's necessary to convict somebody.

Now, Yvonne Baker, you remember her, she was the loan officer that had to do with Cedar Creek, she admitted on cross examination that they, in fact, did relax the rules regarding related parties, to allow the brokers to buy property at Cedar Creek. That was her testimony. And now they're proclaiming that Mr. Neder had his employees buy property and speculate on property. Well, there's nothing in those loan commitments that prohibits that from happening.

[Tr. 250] Once again, he ran that by Tom Turner. He said, can I do that? He says, yes, you can. Just like he ran the equity financing. Tom Turner said he drafted that document, so he must have approved of it.

How do you know that Mr. Neder did not have the specific intent of committing any crimes, and that he thought everything was legal? You know how you know? By his behavior. He told -- and they brought the people on here -- he told his secretary what he was doing, he told Mary Millis what he was doing. He told Margo Doerr and her boss what he was doing.

Is this the specific mental intent of somebody who's trying to conceal and commit crimes? Of course not, unless that person's an idiot.

You heard Mr. Neder testify. I think you can take -- you've got knowledge of the fact that the man's not an idiot. He thought what he was doing was perfectly okay and it was acceptable.

That whole deal with the Bank of the South, where he had spent ninety-some-odd thousand dollars getting a commitment for a construction loan that he didn't take. Remember I asked that lady, I said, "What did you do for that $47,000?" "Oh, we did paper work."

I said, "Well, that's a lot of money, he never took that loan, ma'am." And it's not because Tom Turner said [Tr. 251] that he wouldn't sign something, because Mr. Neder could have gone to another attorney. It was because Mr. Neder knew that his financial condition had changed, so instead of going to another attorney or taking that money under false pretenses, he let it go.

If he was out to deceive he would've taken that money. He needed it and he needed it badly, but he didn't. Now they want to charge him for attempting to do something which he could have done, but he elected not to do because he didn't want to commit a crime.

Now once again, Mr. Kunz wants Tom Turner to say, I was the reason Mr. Neder didn't go forward with that loan from the Bank of the South. Once again, Mr. Kunz wants you to believe when he puts on the, the automatic pilot or the remote control, what Tom Turner should believe. Now what he ought to do is put up a sign saying, believe this, don't believe this, believe this, don't believe this. But you don't have to do that, you just toss it all away because if they'll lie to you once they'll lie to you five times, they'll lie to you ten times, twenty times, he just can't be believed. Don't be fooled by that angelic little face. The man is an admitted thief.

Ladies and gentlemen, the Court is going to read you the law before you go back, and he's going to tell you what the defenses are to all the crimes that are charged in this [Tr. 252] indictment. He will tell you that this Government has to prove each and every single element, not just one part of it, the second part of a three part kind of thing, each and every single element beyond and to the exclusion of all reasonable doubt in order for you to find Mr. Neder guilty of any one or all counts, individually, that is.

You, given this evidence, cannot find Mr. Neder guilty of the charges. What the Government realizes, and they admitted it by throwing out forty counts on somebody and thirty counts on somebody else, is that these are bogus charges. Okay? They admit that, it's an admission on their part.

What did Mike Loyd get thrown out, another ten charges; and then Moore, gosh knows how many charges. Okay? So what have they elected to do? They elected to load that indictment up with as many charges as they could possibly dream up, that they could allege, given the facts, and hope, using that cyclone approach, that you'll come back with something. That's the approach.

Throw it all up against the wall, something is going to have to stick.

And you know what they're betting on? They're betting on something that's so instinctive to Americans, and that's our willingness to compromise. Americans are the greatest compromisers. And you know, that's okay in business and in [Tr. 253] trading, and if this were a civil case -- you know something, that's what needs to be done, someone is so negligent, the other guy's comparatively negligent, compromise.

Ladies and gentlemen, there is no compromise in a criminal case. You have not served the duty and the oath, you have not abided by the oath that you take -- okay -- if you just compromise for the sake of compromise when it comes to freedom. There is no compromise. The Government must prove beyond and to the conclusion of all reasonable doubt every single one of those eighty-one counts, and they can't meet that. They can't draw all those counts and load up that indictment, and hope that something sticks to the wall, and you people get into a deadlock and say, oh, we're going to compromise because that's the American way, that's the way we're used to doing things.

Like I said, that's okay in business, it might be okay in a civil case, but not in a criminal case. Our constitution does not allow that.

But that power, that awesome power allows them to do that, and if you fall into it, you've been used. And I suggest to you that's exactly what's happening. Because, let's face it, you sat here for ten weeks, almost ten weeks, and you saw all this come in here, you say, gee, that's a lot of smoke, must be some fire, it's got to be something, [Tr. 254] how am I to walk out there after listening to ten weeks of testimony, hundred some odd witnesses six hundred, seven hundred exhibits, without convicting somebody.

Because, ladies and gentlemen, if you walk out of here and you don't convict anybody, you, given the facts of this case, walk out of here with your head held high, because you weren't tricked and you weren't fooled and manipulated by the government. Common sense again.

If these eighty-one charges against Mr. Neder had any, any substance, why would they be so willing to throw away the charges on everybody else if they have substance? Why shouldn't they pay for their crimes?

I suggest that's exactly what's happening to you. You're going to see that they're all the same charges over and over again, played differently, and that's exactly what they are. And you know something, like I said, criminal law is really simple. This is not a complicated civil case with contracts and real estate issues and stuff like that, not at all. It's a criminal case. Did Mr. Neder, when he had -- when he sent in those reservation agreements, created, helped create EAT, put in those down payments to stimulate, did he commit a crime? Was that his mens rea, was that his intent to do that or not?

Was there a crime committed here? Not did something bad happen, did people lose money, because people lose money [Tr. 255] in the United States all the time. In this case, it's the fault of the United States. That's not the crime.

And people say, you know, gee, twenty million dollars down the tube, what a crime. That's a figure of speech. It's not a crime. To be a crime you have to have criminal intent. I suggest to you the Government has proven no criminal intent on the part of Mr. Neder.

To act with the intent to defraud means to act knowingly, with the specific intent to deceive someone, ordinarily for the purpose of causing some financial loss to

another or bringing about some financial gain to himself. That didn't happen.

If Mr. Neder wanted to bring financial gain to himself he could have done it from day one, day two, but he didn't. He saw it all the way through. Foolish business man, yeah; beating a dead horse, yeah; criminal, no.

Now, good faith is a complete defense to all those charges that require the intent to defraud in the indictment, since good faith on the part of the defendant is inconsistent with the intent to defraud; or willfulness, the mens -- like I said, the mens rea, specific intent, which is an essential part of those charges. The burden of proof is not on the defendant to prove his good faith, since he has no burden to prove anything. The burden is on the Government to establish beyond and to the exclusion of all [Tr. 256] reasonable doubt that he acted, the defendant, that is, with specific intent to defraud where it is charged.

Now, there is a caveat to this and it says,

"One who expresses an opinion honestly held by him or believed honestly and entertained by him, is not chargeable with fraudulent intent, even though his opinion is erroneous or his belief is mistaken, and similarly if evidence establishes only that a person made a mistake in judgment, or in error, or in management, or was careless, that does not establish fraudulent intent."

Now, there is a cautionary thing about it. It says,

"On the other hand, an honest belief on the part of the defendant that a particular business venture is sound and would ultimately succeed, would not in and of itself constitute good faith as used in these instructions if, in carrying out the venture, the defendant knowingly made false and fraudulent

representations to others with the specific intent to deceive them."

Once again, it still applies. It may sound like, hey, it doesn't apply if he made false statements, but he had to make those false statements, once again, with the specific intent to defraud. Okay? If he believed that he was getting the right advice of counsel, then he didn't have that specific intent, and what he was doing was proper, then he is entitled to that good faith.

[Tr. 257] I suggest to you that he's entitled. He's entitled because he told you what he depended on. He told you what his lawyer told him. His lawyer got up here and lied to you. He denied it.

Mr. Brooks told you the conversations he had with Ellis Neder, what his concerns were. On that tax issue, Mr. Neder told you, before I signed my tax return I went to see Hans Tanzler, who is a tax attorney, one of the top tax attorneys, and he said this is okay. He said he wrote a memo to the IRS supporting what Mr. Neder did, and then he signed his tax returns after the advice. You don't go to jail for getting bad advice.

Ladies and gentlemen, beyond a reasonable doubt, like I said, is the highest, highest burden known in the civilized world. We've enjoyed it in this country for many, many years because there are people like yourselves, who are willing to come in here and hold the government to that burden. You're all from Wisconsin, say, show me, prove it to me.

You walk in here and every American is presumed that right of innocence, and shall never be removed from them until, only until they can bring enough evidence to strip that person of that. In this case they have not done that.

What's reasonable doubt? It's a doubt that you have a reason for. True. It's not any possible doubt, all it has [Tr. 258] to be is a doubt that you can base a reason on. If you believe that Mr. Neder relied on the advice of Mr. Turner, and you have reasonable doubt to believe Mr. Turner's testimony, Mr. Neder is not guilty. It's a doubt that doesn't vacillate.

If you're thinking here, gee, you know something, Neder could be guilty, that's not enough. If you're thinking here, you know, he's probably guilty, that's still not enough. You've got to be convinced to that moral certainty, beyond and to the exclusion of all reasonable doubt that he is guilty, and it's got to feel right not just today or tomorrow, it's got to feel right any time you look back and you think about it.

The Judge will tell you, the most important affairs of your life is the kind of convincing evidence that you rely on to convict somebody. It's not here. You've found out from an historian, Dr. Fish; double talk we got from the bankers who supposedly say, we didn't know, we have asked, we assumed. They may have assumed, you don't assume anything. If you assume anything, you assume guilt you breach that oath you took.

So, unless you can walk out of here convinced forever that Mr. Neder committed all these crimes, every single one of them, then you can't convict him. Not that you can't, the Judge will tell you, you must acquit him, because that's the presumption. You didn't come in here to work for the Government, you came in here to check the Government and make sure that no citizen is abused by the arrogance of power.

Thank you.

THE COURT: Ladies and gentlemen, we're going to recess for the day.

As I told you at the outset, before the arguments of the attorneys, if their recital of the evidence is different than your recollection, it will be your recollection that will control; and I will tell you right now, you will hear from me tomorrow the instructions of the Court which will differ from the arguments the attorneys have made to you.

It will be my instructions on the law that will control in this case, and not what the attorneys tell you the law is; and your sworn duty will be to follow the law that I give to you, as I told you yesterday, whether you agree with it or not.

Do not discuss the case with anyone, even amongst yourselves. Keep an open mind, don't form any opinions or conclusions.

If anything happens to be in the news media, totally disregard it, don't read it, don't listen to it; and if you'll be back at 9:00 o'clock tomorrow morning we'll continue with the closing arguments.

[Tr. 260] Thank you.

(Jury excused 5:30 p.m.)

THE COURT: All right, would you please go through the exhibits and make sure that the exhibits are back so that you can argue with them tomorrow; and if any of you are going to stand there and read from the instructions that I gave you, would you please read them as I will read them to the jury and not paraphrase them as you think they should be, or tell the jury what you think the law is when it's exactly contrary to what I'm going to give them in the instructions tomorrow, it would help.

Thank you, very much.

We'll be in recess until 9:00 o'clock.

(Recess 5:32 p.m.)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

vs.

ELLIS E. NEDER, JR.
ROY F. SMITH, JR.
ROY F. SMITH, JR.
& ASSOCIATES, INC.
PETER A. FOGG

Case No. 91-175-CR-J-16

COURT'S INSTRUCTIONS
TO THE JURY

Members of the Jury:

It is now my duty to instruct you on the rules of law that you must follow and apply in deciding this case. When I have finished you will go to the jury room and begin your discussions -- what we call your deliberations.

I saw that some of you, from time-to-time, have been taking notes during the proceedings. I will give you a written copy of these instructions that I am now reading to you so you need not take notes at this time.

It will be your duty to decide whether the Government has proved beyond a reasonable doubt the specific elements necessary to find the Defendants guilty of the crimes charged in the Indictment.

You must make your decision only on the basis of the testimony and other evidence presented here during the trial;

and you must not be influenced in any way by either sympathy or prejudice for or against the Defendant or the Government.

You must also follow the law as I explain it to you whether you agree with that law or not; and you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law.

The Indictment or formal charge against a Defendant is not evidence of guilt. Indeed, the Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove his or her innocence or produce any evidence at all. The Government has the burden of proving a Defendant guilty beyond a reasonable doubt, and if it fails to do so you must find the Defendant not guilty.

Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that the Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

As stated earlier you must consider only the evidence that I have admitted in the case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted in the record. Remember that anything the lawyers say is not evidence in the case. It is your own recollection and

interpretation of the evidence that controls. What the lawyers say is not binding upon you. Also, you should not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision concerning the facts.

If you have taken notes, your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you did not take notes, you should rely upon your own independent recollection of the proceedings and you should not be unduly influenced by the notes of other jurors. I emphasize that notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been.

In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make; and you should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances indicating that the Defendant is either guilty or not guilty. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not

controlling. You may decide that the testimony of a smaller number of witnesses concerning any fact in dispute is more believable than the testimony of a larger number of witnesses to the contrary.

You will recall during the trial certain witnesses were allowed to testify and give their opinion concerning a summary of previously admitted evidence relating to the flow of certain monies. As I told you then and I shall repeat once more, it is the documents underlying that testimony that you are to consider as evidence in this case. That testimony was offered only as a means of assisting you in comprehending the underlying evidence. The summaries themselves were not admitted into evidence and should not be considered by you as evidence. If any factual dispute arises concerning the summary testimony, you should consider only the underlying source documents in resolving that dispute. And, as I have previously instructed you, it is your duty to decide what weight to ascribe to any evidence; that is, whether you will accept or reject any or all of the evidence is a decision for you to make in accordance with these instructions.

In deciding whether you believe or do not believe any witness I suggest that you ask yourself a few questions: Did the person impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses?

You should also ask yourself whether there was evidence tending to prove that the witness testified falsely

concerning some important fact; or, whether there was evidence that at some other time the witness said or did something, or failed to say or do something, which was different from the testimony he or she gave before you during the trial.

The fact that a witness has been convicted of a felony offense, or a crime involving dishonesty or false statement, is another factor you may consider in deciding whether you believe a witness' testimony.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and that may depend on whether it has to do with an important fact or with only an unimportant detail.

A Defendant has a right not to testify. If a Defendant does testify, however, you should decide in the same way as that of any other witness whether you believe his testimony.

During this trial, a stipulation of anticipated testimony was presented to you. You are to consider and weigh that testimony as though that witness had testified here in Court with regards to that matter.

The testimony of some witnesses must be considered with more caution than the testimony of other witnesses. In this case the Government called as witnesses persons named as a co-defendant, or accomplices, in the Indictment, with whom the Government has entered into a plea agreement providing for the dismissal of some charges and/or a lesser sentence than the witness would otherwise be exposed to for the offense or offenses to which he or she plead guilty, or has been granted

immunity. Such plea bargaining, as it is called, has been approved as lawful and proper, and is expressly provided for in the rules of this Court. However, a witness who hopes to gain more favorable treatment in his or her own case may have a reason to make a false statement because he or she wants to strike a good bargain with the Government. So, while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses.

And, of course, the fact that a witness has plead guilty to the crime charged in the Indictment is not evidence, in and of itself, of the guilt of any other person.

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field -- one who is called an expert witness -- is permitted to state his or her opinion concerning those technical matters.

Merely because an expert witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

In this case, as you know, the Indictment charges eighty-one separate offenses called "counts." I will not read it to you at length because you will be given a copy of the Indictment for study during your deliberations.

A separate crime or offense is charged in each count of the Indictment. Each offense, and the evidence pertaining to it, should be considered separately. Also, the case of each Defendant should be considered separately and individually. The fact that you may find one or more of the Defendants guilty or not guilty of any of the offenses charged should not

affect your verdict as to any other offense or any other Defendant.

I caution you, members of the Jury, that you are here to determine from the evidence in this case whether the Defendant is guilty or not guilty. The Defendant is on trial only for those specific offenses alleged in the Indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the Defendant is convicted the matter of punishment is for the Judge to determine.

In summary, Count One charges that the Defendants knowingly and willfully conspired together in violation of Title 18, United States Code, Section 371, to execute and attempt to execute a scheme and artifice to defraud and to obtain the moneys owned by and under the custody and control of federally insured financial institutions, by means of false and fraudulent pretenses, representations, and promises, in violation of Title 18, United States Code, Section 1344; and to knowingly make any false statement or report, or willfully overvalue any land, property or security for the purpose of influencing in any way the action of the institutions the accounts of which are insured by the FSLIC upon applications and loans, or any change or extension of any of the same, in violation of Title 18, United States Code, Section 1014; and to knowingly and willfully transmit by means of wire communications in interstate commerce writings, signals, pictures, and sounds for the purpose of executing a scheme and artifice to defraud, and to obtain moneys by false pretenses, representations, and promises, in violation of Title 18, United States Code, Section 1343.

Count Ninety charges that the Defendants unlawfully and willfully entered into a separate conspiracy in violation of Title 18, United States Code, Section 1962(d), to conduct and

participate, directly or indirectly, in the conduct of the affairs of an enterprise through a pattern of racketeering activity consisting of mail fraud and wire fraud, in violation of Title 18, United States Code, Section 1962(c).

The remaining Counts charge the commission of the substantive offenses; namely, that the Defendants committed bank fraud in Counts Two through Twelve, and Seventy-seven, in violation of Title 18, United States Code, Section 1344; land over-evaluations in Counts Thirteen through Twenty, and false statements to financial institutions in Counts Thirty-six through Seventy-two, all in violation of Title 18, United States Code, Section 1014; mail fraud in Counts Twenty-one through Twenty-three, Twenty-six through Twenty-eight, Thirtv, Thirty-four, and Thirty-five, all in violation of Title 18, United States Code, Section 1341; wire fraud in Counts Thirty-one through Thirty-three, and Seventy-eight through Eighty-four, all in violation of Title 18, United States Code, Section 1343; false statements on income tax returns in Counts Eighty-six and Eighty-seven, all in violation of Title 26, United States Code, Section 7206(l); and racketeering in Count Eighty-nine, in violation of Title 18, United States Code, Section 1962(c).

You will note that as to Counts One and Ninety, the Defendants are not charged in those counts with violating the substantive counts I have named; rather they are charged with having conspired to do so in violation of Title 18, United States Code, Sections 371 and 1962(d).

I will explain the law governing those substantive offenses in a moment.

Title 18, United States Code, Section 371, makes it a separate federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would amount to another Federal crime or offense. So, under this law, a "conspiracy" is an agreement or a kind of

"partnership" in criminal purposes in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense in Count One, it is not necessary for the Government to prove that all of the people named in the indictment were members of the scheme; or that those who were members had entered into any formal type of agreement; or that the members had planned together all of the details of the scheme or the "overt acts" that the indictment charges would be carried out in an effort to commit the intended crime.

Also, because the essence of a conspiracy offense is the making of the agreement itself (followed by the commission of any overt act), it is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

A Defendant can be found guilty of that offense as charged in Count One only if all of the following elements are proved beyond a reasonable doubt:

First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;

Second: That the Defendant willfully became a member of such conspiracy;

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the methods (or "overt acts") described in the indictment; and

Fourth: That such "overt act" was knowingly committed at or about the time alleged in

an effort to carry out or accomplish some object of the conspiracy.

An "overt act" is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

A person may become a member of a conspiracy without knowing all of the details of the unlawful scheme, and without knowing who all of the other members are. So, if a Defendant has an understanding of the unlawful nature of a plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict him for conspiracy even though he did not participate before, and even though he played only a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of one, does not thereby become a conspirator.

In this instance, with regard to the alleged conspiracy in Count One, the Indictment charges that the Defendants conspired with each other and other persons to commit bank fraud or wire fraud, or to make false statements to federally insured financial institutions. It is charged, in other words, that they conspired to commit three separate, substantive crimes or offenses.

In such a case it is not necessary for the Government to prove that the Defendant under consideration willfully conspired to commit all of the substantive offenses. It would be sufficient

if the Government proves, beyond a reasonable doubt, that the Defendants willfully conspired with someone to commit one of those offenses; but, in that event, in order to return a verdict of guilty, you must unanimously agree upon which of the three offenses the Defendants conspired to commit. If you cannot agree in that manner, you must find the Defendant not guilty.

Title 18, United States Code, Section 1344, makes it a federal crime or offense for anyone to execute or attempt to execute a scheme to obtain money of a federally insured financial institution.

A Defendant can be found guilty of that offense as charged in Counts Two through Twelve, and Seventy-seven only if all of the following elements are proved beyond a reasonable doubt:

First: That the Defendant knowingly and willfully devised a scheme for obtaining, by means of false or fraudulent pretenses, representations or promises, moneys or funds owned by or under the custody or control of a federally insured financial institution;

Second: That the Defendant participated directly in, or aided and abetted, the making of false pretenses, representations, or promises which were material to the federally insured institution; and

Third: That the Defendant executed, or aided and abetted the execution of the scheme by preparing and submitting and causing to be prepared and submitted to the insured financial institution certain documents.

A federal insured financial institution means any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, or any savings and loan associations, whose deposits are insured by the Federal Savings and Loan Insurance Corporation.

The word "scheme" includes any plan or course of action intended to deceive others, and to obtain, by false or fraudulent pretenses, representations or promises, money or property from persons so deceived.

A statement or representation is "false" or "fraudulent" if it relates to a material fact and is known to be untrue or is made with reckless indifference as to its truth or falsity, and is made or caused to be made with intent to defraud. A statement or representation may also be "false" or "fraudulent" when it constitutes a half truth with intent to defraud, or effectively conceals a material fact with intent to defraud. A "material fact" is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction.

If you find that the Government has proved these three elements stated above beyond a reasonable doubt, you need not consider whether the false and fraudulent pretense, representation, or promise was a material false and fraudulent pretense, representation or promise, even though that language is used in the Indictment. This is not a question for the jury to decide.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive someone, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

Good faith is a complete defense to those charges that require intent to defraud in the indictment since good faith on

the part of the Defendant is inconsistent with intent to defraud or willfulness which is an essential part of the charges. The burden of proof is not on the Defendant to prove his good faith, of course, since he has no burden to prove anything. The Government must establish beyond a reasonable doubt that the Defendant acted with specific intent to defraud where it is charged in the indictment.

One who expresses an opinion honestly held by him, or a belief honestly entertained by him, is not chargeable with fraudulent intent even though his opinion is erroneous or his belief is mistaken; and similarly, evidence which establishes only that a person made a mistake in judgment or an error in management, or was careless, does not establish fraudulent intent.

On the other hand, an honest belief on the part of the Defendant that a particular business venture was sound and would ultimately succeed would not, in and of itself, constitute "good faith" as used in these instructions if, in carrying out that venture, the Defendant knowingly made false or fraudulent representations to others with the specific intent to deceive them.

It is not necessary that the Government prove all of the details alleged in the Indictment concerning the precise nature and purpose of the scheme; or that the alleged scheme actually succeeded in defrauding anyone.

What must be proved beyond a reasonable doubt is that the Defendant knowingly and willfully devised or intended to devise a scheme to defraud substantially the same as the one alleged in the Indictment; and that the act in execution or scheme was performed as charged.

Each separate act of execution in furtherance of a scheme to defraud constitutes a separate offense.

Title 18, United States Code, Section 1014, makes it a federal crime or offense for anyone to willfully overvalue any land to a federally insured bank or savings and loan association.

A Defendant can be found guilty of that offense charged in Counts Thirteen through Twenty only if all of the following elements are proved beyond a reasonable doubt:

First: That the Defendant knowingly overvalued any land, and such overvaluation was a material fact to an insured savings and loan association or insured bank, as charged; and

Second: That the Defendant overvalued the land willfully and with intent to influence the action of the savings and loan association or insured bank upon an application, advance, commitment or loan, or any change or extension thereof.

An "insured bank" means any bank the deposits of which are insured by the Federal Deposit Insurance Corporation. An "insured savings and loan association" means any such institution whose deposits are insured by the Federal Savings and Loan Insurance Association.

The terms "false" and "material" have already been defined for you.

It is not necessary, however, to prove that the institution involved was, in fact, influenced or misled. The gist of the offense is an attempt to influence such an institution willfully overvaluing land.

If you find that the Government has proved these two elements stated above beyond a reasonable doubt, you need not consider whether the false and fraudulent pretense,

representation, or promise was a material false and fraudulent pretense, representation or promise, even though that language is used in the indictment. This is not a question for the jury to decide.

Title 18, United States Code, Section 1014, makes it a federal crime or offense for anyone to willfully make a false statement to a federally insured bank or savings and loan association.

A Defendant can be found guilty of that offense charged in Counts Thirty-six through Seventy-two only if all of the following elements are proved beyond a reasonable doubt:

First: That the Defendant knowingly made a false statement or report concerning a material fact to an insured savings and loan association or insured bank, as charged; and

Second: That the Defendant made the false statement or report willfully and with intent to influence the action of the savings and loan association or insured bank upon an application, advance, commitment or loan, or any change or extension thereof.

The terms "insured bank," "false," and "material" have already been defined for you.

Again, it is not necessary to prove that the institution involved was, in fact, influenced or misled. The gist of the offense is an attempt to influence such an institution by willfully making a false statement or report concerning the matter.

If you find that the Government has proved these two elements stated above beyond a reasonable doubt, you need not consider whether the false and fraudulent pretense,

representation, or promise was a material false and fraudulent pretense, representation or promise, even though that language is used in the indictment. This is not a question for the jury to decide.

Title 18, United States Code, Section 1341, makes it a federal crime or offense for anyone to use the United States mails in carrying out a scheme to defraud.

A Defendant can be found guilty of that offense charged in Counts Twenty-one through Twenty-three, Twenty-six through Twenty-eight, Thirty, Thirty-four and Thirty-five only if all of the following elements are proved beyond a reasonable doubt:

First: That the Defendant knowingly and willfully devised a scheme to defraud, or for obtaining money or property by means of false pretenses, representations or promises; and

Second: That the Defendant used the United States Postal Service by mailing, or by causing to be mailed, or takes or receives therefrom, some matter or thing for the purpose of executing the scheme to defraud.

The terms "scheme," "false," "material," and "intent to defraud" have already been defined for you.

It is not necessary that the Government prove all of the details alleged in the Indictment concerning the precise nature and purpose of the scheme; or that the material mailed was itself false or fraudulent; or that the alleged scheme actually succeeded in defrauding anyone; or that the use of the mail was intended as the specific or exclusive means of accomplishing the alleged fraud.

What must be proved beyond a reasonable doubt is that the Defendant knowingly and willfully devised or intended to devise a scheme to defraud substantially the same as the one alleged in the Indictment; and that the use of the U.S. mail was closely related to the scheme because the Defendants either mailed something, or caused it to be mailed, or took or received a matter or thing in an attempt to execute or carry out the scheme. To "cause" the mails to be used is to do an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use can reasonably be foreseen.

Each separate use of the mails in furtherance of a scheme to defraud constitutes a separate offense.

Title 18, United States Code, Section 1343, makes it a federal crime or offense for anyone to use interstate wire communications facilities in carrying out a scheme to defraud.

A Defendant can be found guilty of that offense charged in Counts Thirty-one through Thirty-three and Seventy-eight through Eighty-four only if all of the following elements are proved beyond a reasonable doubt:

First: That the Defendant knowingly and willfully devised a scheme to defraud, or for obtaining money or property by means of false pretenses, representations or promises; and

Second: That the Defendant knowingly transmitted or caused to be transmitted by wire in interstate commerce some sound for the purpose of executing the scheme to defraud.

The words "scheme," "false," and "intent to defraud" have been previously defined for you.

It is not necessary that the Government prove all of the details alleged in the Indictment concerning the precise nature and purpose of the scheme; or that the material transmitted by wire was itself false or fraudulent; or that the alleged scheme actually succeeded in defrauding anyone; or that the use of the interstate wire communication facilities was intended as the specific or exclusive means of accomplishing the alleged fraud.

What must be proved beyond a reasonable doubt is that the Defendant knowingly and willfully devised or intended to devise a scheme to defraud substantially the same as the one alleged in the Indictment; and that the use of the interstate wire communications facilities was closely related to the scheme because the Defendant either wired something, or caused it to be wired in interstate commerce in an attempt to execute or carry out the scheme. To "cause" interstate wire communication facilities to be used to do an act with knowledge that the use of the wires will follow in the ordinary course of business or where such use can reasonably be foreseen.

Each separate use of the interstate wire communications facilities in furtherance of a scheme to defraud constitutes a separate offense.

Title 26, United States Code, Section 7206(1), makes it a crime for anyone willfully to make a false statement on an income tax return. "Willfully" means with intent to violate a known legal duty.

The Defendant Neder can be found guilty of that offense as charged in Counts Eighty-six and Eighty-seven, only if all of the following elements are proved beyond a reasonable doubt:

First: That the Defendant signed an income tax return that contained a written declaration that it was made under penalties of perjury:

Second: That in this return the Defendant falsely reported a total income in his 1985 return of $53,625 and in his 1986 return a minus $980,377;

Third: That the Defendant knew the statement was false; and

Fourth: That the Defendant made the statement on purpose, and not as a result of accident, negligence or inadvertence.

If you find that the Government has proved these things, you need not consider whether the false statement was a material false statement, even though that language is used in the indictment. This is not a question for the jury to decide.

Count Eighty-nine of the Indictment charges that from in or about May 1984 to in or about May 1988, the Defendants were persons associated with an "enterprise" engaged in, or the activities of which affected, interstate commerce, and that they knowingly and willfully participated in the conduct of the enterprise's affairs "through a pattern of racketeering activity," in violation of Title 18, United States Code, Section 1961 and 1962(c).

The term "enterprise" includes any "partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Individuals and corporations are a "group of individuals associated in fact."

The term "racketeering activity" includes any act in violation of Title 18 of the Untied States Code relating to mail fraud (Section 1341) and wire fraud (Section 1343).

The term "pattern of racketeering activity" requires at least two acts of "racketeering activity," sometimes called

"predicate offenses," which must have been committed within ten years of each other, one of which must have occurred after October 15, 1970.

A Defendant can be guilty of that offense as charged in Count Eighty-nine only if all of the following elements are proved beyond a reasonable doubt:

First: That the Defendant was associated with an "enterprise" as defined in these instructions;

Second: That the Defendant knowingly and willfully committed, or knowingly and willfully aided and abetted the commission of at least two of the predicate offenses hereinafter specified;

Third: That the two predicate offenses alleged committed by the Defendant were connected with each other by some common scheme, plan or motive so as to be a pattern or a criminal activity and not merely a series of separate, isolated or disconnected acts;

Fourth: That through the commission of the two or more connected offenses, the Defendant conducted or participated in the conduct of the "enterprises's" affairs; and

Fifth: That the "enterprise" was engaged in, or that its activities affected, interstate commerce.

With respect to the Second specific element defined above, the Government must prove beyond a reasonable doubt that the Defendant under consideration knowingly and willfully

committed, or aided and abetted the commission of, any two of the predicate offenses specifically alleged and described in the Indictment as Counts Twenty-one through Twenty-three, Thirty-one, Twenty-six through Twenty-eight, Thirty, Thirty-two through Thirty-five and Seventy-eight through Eighty-Four, and alleged as racketeering acts 1 through 3, 4(b), 6 though 8, and 10 through 15(g). You are further instructed, however, that you must unanimously agree concerning each Defendant under consideration as to which of the two predicate offenses he is alleged to have committed, or aided and abetted in committing. It would not be sufficient if some of the jurors should find that a Defendant committed two of the predicate offenses while the remaining jurors found that he committed two different offenses; you must all agree upon the same two predicate offenses in order to find a Defendant guilty of Count Eighty-nine.

With respect to the Fifth specific element defined above the requirement that the "enterprise" was engaged in, or that its activities affected, interstate commerce the Government contends that in conducting the affairs of the enterprise the Defendants would: obtain loan proceeds from lenders by interstate and intrastate wire transmissions; mail documents out of the State of Florida for signature and cause them to be returned to the State of Florida as part of various loan and real estate transactions; send correspondence and documents from Jacksonville in the State of Florida to locations outside the State of Florida in support of their attempts to obtain land acquisition and land development loans. The Government contends that documents in support of various loan requests were sent from the State of Florida to the States of Arizona, New York, and to Washington, D.C., causing the transmission of funds by wire in interstate commerce. You are instructed that if you find beyond a reasonable doubt that these transactions or events occurred, and that they occurred in, or as a direct result of, the

conduct of the affairs of the alleged enterprise, the required effect upon interstate commerce has been established. If you do not so find, the required effect upon interstate commerce has not been accomplished.

Title 18, United States Code, Section 1962(c), makes it a federal crime or offense for anyone who is associated with an "enterprise" engaged in, or activities of which affect, interstate commerce, to participate in conducting the affairs of the enterprise through a "pattern of racketeering activity."

The meaning of those terms, and an explanation of what must be proved in order to establish that offense, is discussed in that part of these instructions covering Count Eighty-nine of the Indictment.

However, the Defendants named in Count Ninety of the Indictment the conspiracy count are not charged in that count with violating Section 1962(c); rather, they are charged with knowingly and willfully conspiring to violate that law, the alleged conspiracy itself being a separate crime or offense in violation of Section 1962(d).

So, under that law a "conspiracy" is a combination or agreement of two or more persons to join together to attempt to accomplish an offense which would be in violation of Section 1962(c) as elsewhere defined in these instructions. It is a kind of "partnership in criminal purposes" in which each member becomes the agent of every other member.

The evidence in the case need not show that the alleged members of the conspiracy, in Count Ninety, entered into any express or formal agreement; or that they directly discussed between themselves the details of the scheme and its purpose, or the precise ways in which the purpose was to be accomplished. Neither must it be proved that all of the persons charged to have been members of the conspiracy were such, nor

that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

A Defendant can be found guilty of that offense as charged in Count Ninety only if all of the following elements are proved beyond a reasonable doubt:

First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, namely, to engage in a "pattern of racketeering activity" as charged in the indictment; and

Second: That the Defendant knowingly and willfully became a member of such conspiracy; and

Third: That at the time the Defendant knowingly and willfully agreed to join in such conspiracy, he did so with the specific intent either to personally participate in the commission of two "predicate offenses," as elsewhere defined in these instructions, or that he specifically intended to otherwise participate in the affairs of the "enterprise" with the knowledge and intent that other members of the conspiracy would commit two or more "predicate offenses" as a part of a "pattern of racketeering activity."

A person may become a member of this conspiracy without full knowledge of all of the details of the unlawful scheme or the names and identities of all of the other alleged conspirators. So, if a Defendant has an understanding of the unlawful nature of a plan and knowingly and willfully joining

that plan on one occasion, that is sufficient to convict him for conspiracy even though he did not participate before, and even though he played only a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other, and have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of a conspiracy, does not thereby become a conspirator.

The guilt of a Defendant in a criminal case may be proved without evidence that he personally did every act involved in the commission of the crime charged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished through direction of another person as an agent, or by acting together with, or under the direction of, another person or persons in a joint effort.

So, if the acts or conduct of an agent, employee or other associate of the Defendant are willfully directed or authorized by the Defendant, or if the Defendant aids and abets another person by willfully joining together with that person in the commission of a crime, then the law holds the Defendant responsible for the conduct of that other person just as though the Defendant had engaged in such conduct himself.

Notice, however, that before any Defendant can be held criminally responsible for the conduct of others it is necessary that the Defendant willfully associate himself in some way with the crime, and willfully participate in it. Mere presence at the scene of a crime and even knowledge that a crime is being committed are not sufficient to establish that a Defendant either directed or aided and abetted the crime. You must find beyond

a reasonable doubt that the Defendant was a willful participant and not merely a knowing spectator.

One of the Defendants is a corporation. A corporation is a legal entity, and it may be found guilty of a criminal offense.

A corporation, of course, cannot act for itself. It may only act through its agents. Agents are the officers, directors, employees, or other persons who may be authorized to act for the corporation. A corporation is legally responsible for those acts or omissions of its agents made or performed within the scope of their employment.

To find a corporate defendant guilty, you must find beyond a reasonable doubt that all the essential elements of the offense, as set forth in these instructions, are present as to the corporation in the form of acts or omissions of its agents which were performed with the scope of their employment. Whether the agents' acts or omissions were committed within the scope of their employment is a question of fact.

To be acting within his employment, the agent first must have intended that his act would produce some benefit to the corporation. Second, the agent must have been acting within his authority. An act was within the agent's authority if it was directly related to the performance of the type of duties that the employee had the general authority to perform or if outsiders could reasonably assume that the agent had the authority to perform the act, judging from his position with the company, the responsibility previously entrusted to him, and the circumstances surrounding his past conduct.

If the agent was acting within the scope of his employment, the fact that the agent's act was illegal, contrary to his employer's instructions, or against the corporation's policies will not relieve the corporation of responsibility for it.

If you find that an act of an agent was not committed within the scope of his employment, then you must consider whether the corporation later approved the act. An act is approved if, after it is performed, another agent of the corporation, with the authority to perform or authorize the act, and with the intent to benefit the corporation, either expressly approves or engages in conduct that is consistent with approving the act.

A corporation is legally responsible for any act or omission approved by its agents.

In these charges, the Court has reviewed the pertinent parts of federal statutes which are alleged to have been violated. Where a statute specifies several alternative ways in which an offense may be committed, the Indictment may allege the several ways in the conjunctive, that is, by using the word "and;" therefore, if only one of the alternatives is proved beyond a reasonable doubt, that is sufficient for conviction, so long as the jury agrees unanimously as to at least one of the alternatives.

You will note that the Indictment charges that the offenses were committed "on or about" a certain date. The Government does not have to prove with certainty the exact date of the alleged offenses. It is sufficient if the Government proves beyond a reasonable doubt that the offenses were committed on a date reasonably near the date alleged.

The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

The word "willfully," as that term has been used from time to time in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to

do something the law forbids; that is with bad purpose either to disobey or disregard the law.

Any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to re-examine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges -- judges of the facts. Your only interest is to seek the truth from the evidence in the case.

When you go to the jury room you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience.

You will take the verdict form to the jury room and when you have reached unanimous agreement you will have your foreperson fill in the verdict form, date and sign it, and then return to the courtroom.

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the marshal who will bring it to my attention. I will

then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.

Supreme Court, U.S.
FILED
NOV 25 1998
CLERK

(5)

No. 97-1985

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ELLIS E. NEDER, JR., PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTIONS PRESENTED

1. Whether the trial court's failure to instruct the jury on the materiality element in this case was harmless error because materiality was not in dispute at trial.

2. Whether materiality is an element of the crimes set forth in the federal mail fraud (18 U.S.C. Section 1341), wire fraud (18 U.S.C. Section 1343) and bank fraud (18 U.S.C. Section 1344) statutes.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT 1

SUMMARY OF ARGUMENT 6

ARGUMENT 9

I. A DIRECTED VERDICT OF GUILT ON AN ELEMENT OF A CHARGED OFFENSE CANNOT CONSTITUTIONALLY BE SUBJECT TO HARMLESS-ERROR REVIEW. 9

A. Harmless-Error Review Cannot Be Used To Supply Factual Findings On Elements That Were Removed Explicitly From The Jury's Consideration. 10

B. This Court's Instructional Error Decisions Make Clear That The Harmless-Error Doctrine Is Inapplicable When The Jury Has Failed To Render A Complete Verdict On Every Element Of The Offense Charged. 17

Page

C. Removal Of An Element From The Jury's Consideration Cannot Be Cured By An Appellate Court's Finding That The Element Was "Not In Dispute," Or That The Evidence Of Guilt Was "Overwhelming" 22

D. Complete Removal Of An Element Requires Reversal To Preserve The Constitutional Right To A Jury Trial. 27

II. MATERIALITY IS AN ELEMENT OF THE FEDERAL MAIL FRAUD, WIRE FRAUD, AND BANK FRAUD STATUTES. 30

A. The Plain Language Of The Mail Fraud, Wire Fraud, And Bank Fraud Statutes Confirms That Materiality Is An Element Of Each Crime. 30

B. Congress Did Not Intend To Alter The Common-Law Meaning Of "Fraud" In The Mail Fraud, Wire Fraud, And Bank Fraud Statutes. 35

C. Due Process And The Rule Of Lenity Also Require That The Mail Fraud, Wire Fraud, And Bank Fraud Statutes Be Read To Include A Materiality Element. . . 48

CONCLUSION 50

TABLE OF AUTHORITIES

Page

Cases

Adamo Wrecking Co. v. *United States*, 434 U.S. 275 (1978) . . 49

Affiliated Ute Citizens v. *United States*, 406 U.S. 128 (1972) . 46

Arizona v. *Fulminante*, 499 U.S. 279 (1991) 14, 15, 23

Basic, Inc. v. *Levinson*, 485 U.S. 224 (1988) 46

BMW of N. Am., Inc. v. *Gore*, 517 U.S. 559 (1996) 8, 33

Bollenbach v. *United States*, 326 U.S. 607 (1946) 25, 26

Brooks v. *United States*, 146 F. 223 (8th Cir. 1906) 44

Buckley v. *Valeo*, 424 U.S. 1 (1976) 49

Cabana v. *Bullock*, 474 U.S. 376 (1986) 15

Caldwell v. *Mississippi*, 472 U.S. 320 (1985) 28

California v. *Roy*, 117 S. Ct. 337 (1996) . 14, 19, 20, 21, 24, 26

Carella v. *California*, 491 U.S. 263 (1989) . . . . . *passim*

Carpenter v. *United States*, 484 U.S. 19 (1987) 30

Carpenters & Joiners v. *United States*, 330 U.S. 395 (1947) 14, 17, 18, 21, 23, 24

Chapman v. *California*, 386 U.S. 18 (1967) 6, 11, 23

Colorado v. *New Mexico*, 467 U.S. 310 (1984) 28

TABLE OF AUTHORITIES — Continued

Page

Commonwealth v. *Drew*, 19 Pick. 179 (Mass. 1837) 37

Commonwealth v. *Hershell*, Thacher's Cr. Cases 70 (Boston Mun. Ct. 1824) 37

Community for Creative Non-Violence v. *Reid*, 490 U.S. 730 (1989) 35

Connecticut v. *Johnson*, 460 U.S. 73 (1983) 13, 20, 22, 26

Crandon v. *United States*, 494 U.S. 152 (1990) 49

Davis v. *United States*, 160 U.S. 469 (1895) 10

Delaware v. *Van Arsdall*, 475 U.S. 673 (1986) 11

Dunbar v. *Preston*, 132 A. 707 (Pa. 1926) 35

Duncan v. *Louisiana*, 391 U.S. 145 (1968) . 9, 14, 15, 16, 27, 28

Durland v. *United States*, 161 U.S. 306 (1896) 31, 41, 42, 43, 46

Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) 49

Estelle v. *McGuire*, 502 U.S. 62 (1991) 22

Evans v. *United States*, 153 U.S. 584 (1894) 42

Faulkner v. *United States*, 157 F. 840 (5th Cir. 1907) 44

Fedorenko v. *United States*, 449 U.S. 490 (1981) 46

TABLE OF AUTHORITIES — Continued

Page

Field v. *Mans*, 516 U.S. 59 (1995) 33, 47

Flachskamm v. *United States*, 127 F. 674 (7th Cir. 1904) . 44, 45

Harris v. *Rosenberger*, 145 F. 449 (8th Cir. 1906) 43

Henderson v. *Morgan*, 426 U.S. 637 (1976) 26

Herron v. *Dibrell*, 12 S.E. 674 (Va. 1891) 35

Hubbard v. *United States*, 514 U.S. 695 (1995) 48

Johnson v. *United States*, 117 S. Ct. 1544 (1997) 4, 19, 27

Kungys v. *United States*, 485 U.S. 759 (1988) . . . 31, 38, 42, 46

Lanzetta v. *New Jersey*, 306 U.S. 451 (1939) 8, 48

Lare v. *Westmoreland Specialty Co.*, 25 A. 812 (Pa. 1893) . . . 35

Lemon v. *United States*, 164 F. 953 (8th Cir. 1908) 44

Liparota v. *United States*, 471 U.S. 419 (1985) 50

Mathews v. *United States*, 485 U.S. 58 (1988) 22

McAleer v. *Horsey*, 35 Md. 439 (1872) 33, 34

McBoyle v. *United States*, 283 U.S. 25 (1931) 48

McNally v. *United States*, 483 U.S. 350 (1987) 31, 40, 41, 47, 49

TABLE OF AUTHORITIES — Continued

Page

Molzof v. *United States*, 502 U.S. 301 (1992) 7, 31

Morisette v. *United States*, 342 U.S. 246 (1952) 32

Moskal v. *United States*, 498 U.S. 103 (1990) 32

NLRB v. *Amax Coal Co.*, 453 U.S. 322 (1981) 8, 32, 35

Old Chief v. *United States*, 117 S. Ct. 644 (1997) 22

Parr v. *United States*, 363 U.S. 370 (1960) 31, 40

Pereira v. *United States*, 347 U.S. 1 (1954) 31

Pope v. *Illinois*, 481 U.S. 497 (1987) 18, 19, 20, 21

Ratzlaf v. *United States*, 510 U.S. 135 (1994) 49

Rewis v. *United States*, 401 U.S. 808 (1971) 50

Roe v. *United States*, 287 F.2d 435 (5th Cir. 1961) 22

Rogers v. *United States*, 118 S. Ct. 673 (1998) 23

Rose v. *Clark*, 478 U.S. 570 (1986) . . 13, 14, 15, 16, 20, 23, 24

Santa Fe Indus., Inc. v. *Green*, 430 U.S. 462 (1977) 46

Slaughter's Administrator v. *Gerson*, 80 U.S. (13 Wall.) 379 (1872) 35

Smith v. *Richards*, 38 U.S. (13 Pet.) 26 (1839) 8, 35

TABLE OF AUTHORITIES — Continued

Page

Snow v. *Alley*, 11 N.E. 764 (Mass. 1887) 35

Sparf v. *United States*, 156 U.S. 51 (1895) 13

Standard Oil Co. v. *United States*, 221 U.S. 1 (1911) 32

Sullivan v. *Louisiana*, 508 U.S. 275 (1993) . . . . . *passim*

United States v. *Bayer*, 331 U.S. 532 (1947) 28

United States v. *Cochran*, 109 F.3d 660 (10th Cir. 1997) 5

United States v. *Coffman*, 94 F.3d 330 (7th Cir. 1996) 36

United States v. *DiRico*, 78 F.3d 732 (1st Cir. 1996) 12

United States v. *Fern*, 117 F.3d 1298 (11th Cir. 1997) 4

United States v. *Gaudin*, 515 U.S. 506 (1995) 4, 6, 9, 12, 22, 24, 27, 38

United States v. *Granderson*, 511 U.S. 39 (1994) 8, 49

United States v. *Hasting*, 461 U.S. 499 (1983) 26

United States v. *Jones*, 10 F. 469 (C.C.S.D.N.Y. 1882) . 42, 45

United States v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977) 13, 14

United States v. *Nash*, 115 F.3d 1431 (1997), cert. denied, 118 S. Ct. 1054 (1998) 5

TABLE OF AUTHORITIES — Continued

Page

United States v. *Owens*, 17 F. 72 (E.D. Mo. 1883) 42

United States v. *Wells*, 519 U.S. 482 (1997) . . . 4, 8, 32, 35, 47

United States v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) . . 49

Williams v. *United States*, 458 U.S. 279 (1982) 49

Winship, In re, 397 U.S. 358 (1970) 9

Witherspoon v. *Illinois*, 391 U.S. 510 (1968) 29

Woodbury v. *State*, 69 Ala. 242 (1881) 37

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Young v. *The King*, 3 Term Rep. 98 (K.B. 1789) 37

Constitutional Provisions

U.S. CONST. ART. III, § 2 1

U.S. CONST. AMEND. V 1

U.S. CONST. AMEND. VI 1

Statutes and Rules

Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283 . . . . . 30, 38

Act of Mar. 2, 1889, ch. 393, § 1, 25 Stat. 873 40

TABLE OF AUTHORITIES — Continued

Page

Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130 41

Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4508 (1988) 41

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18 U.S.C. § 1341 . . . . . *passim*

18 U.S.C. § 1343 . . . . . *passim*

18 U.S.C. § 1344 . . . . . *passim*

18 U.S.C. § 1346 41

26 U.S.C. § 7206(1) 1, 4

17 C.F.R. § 210.10b-5 46

30 Geo. 2, ch. 24, § 1 (1757) (Eng.) 36

52 Geo. 3, ch. 64 (1812) (Eng.) 37

7 & 8 Geo. 4, ch. 29, § 53 (1827) (Eng.) 37

24 & 25 Vict., ch. 96, § 88 (1861) (Eng.) 37

TABLE OF AUTHORITIES — Continued

Page

Miscellaneous

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M. BIGELOW, A TREATISE ON THE LAW OF FRAUD ON ITS CIVIL SIDE (1888) 43

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TABLE OF AUTHORITIES — Continued

Page

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TABLE OF AUTHORITIES — Continued

Page

J. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771 (1980) 40

RESTATEMENT (SECOND) OF TORTS § 538 (1977) 33

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BRIEF FOR PETITIONER

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-13a) is reported at 136 F.3d 1459. The judgment of the district court (Pet. App. 14a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1998. Pet. App. 14a-22a. The petition for a writ of certiorari was filed on June 9, 1998, and granted on October 13, 1998. 119 S. Ct. 334. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Article III, § 2 of the United States Constitution provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "No person shall be * * * deprived of life, liberty, or property, without due process of law." The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." 18 U.S.C. §§ 1341, 1343, 1344, and 26 U.S.C. § 7206(1) are reproduced at Pet. App. 43a-47a.

STATEMENT

1. On August 23, 1991, petitioner was indicted on multiple counts of federal tax, mail, wire and bank fraud in connection with a series of land acquisition and development transactions during the 1980s. J.A. 33-144. The indictment alleged that petitioner engaged in a scheme to defraud lenders by concealing material facts regarding the structure of the acquisition transactions and the source of certain deposit funds from buyers of petitioner's real estate developments.

Ibid. The government also alleged that petitioner's 1985 and 1986 income tax returns omitted material facts by failing to report the profits from these transactions.

The government's land acquisition charges specifically alleged that petitioner financed "land-flip" transactions. According to the government, petitioner used "shell" corporations that he controlled to purchase land from third-party titleholders at bargain prices, and then to sell those properties to himself at higher prices using inflated appraisals, with petitioner then keeping the excess loan proceeds as "profit." J.A. 42-44. The government further alleged that petitioner failed to disclose material facts to his lenders concerning his "nominee" relationship with the shell corporations. *Ibid.*

The government's land development charges alleged that petitioner fraudulently obtained loans to finance a variety of land development projects. J.A. 44-45. Specifically, the government alleged that to satisfy pre-sale commitment requirements of his lenders, petitioner solicited buyers by agreeing to advance their initial deposits, but failed to disclose those advances to the lenders. *Ibid.* The indictment further alleged that petitioner fraudulently obtained construction draws in connection with a particular project by presenting materially false invoices. J.A. 45-47.

Finally, the government's tax fraud charges alleged that petitioner's 1985 and 1986 tax returns failed to report $1,372,360 in income for 1985, and $4,355,766 in income for 1986, all allegedly derived from excess loan proceeds obtained from the real estate acquisition transactions. J.A. 122-123.

Petitioner pleaded not guilty to all counts of the indictment, and did not stipulate or admit to any element of the charges. Petitioner defended the land acquisition charges on the ground that the land parcels purchased by the "shell" corporations were acquired at prices well below fair market value, and were sold at the true fair market values utilized for the financing. Petitioner also contended that the appraisals used to obtain the financing were not inflated, and were approved by the lender. J.A. 190-191, 200-205 (closing argument). Petitioner also argued that the use of nominee corporations to acquire real estate was entirely proper, and that the lenders in question were

unconcerned about, and in some cases were aware of, the structure of these transactions. *Id.* at 171-188. Petitioner also defended the charges on the ground that he relied on the advice of his counsel and his accountant when structuring the transactions. *Id.* at 217-223.

Petitioner contested the land development fraud charges on the ground that, among other things, the loan documents did not prohibit him from advancing deposits to secure prospective buyers, and that petitioner did not refuse to disclose the source of those advances to any lender. J.A. 188-189. Petitioner also argued that his lender was aware of how his construction draws were being used, and had given its approval. *Id.* at 193-194. Finally, petitioner challenged the tax fraud charges on the ground that the funds cited by the government were not "income" for the 1985 and 1986 tax years, but were merely loan proceeds, and that under an allowable interpretation of the tax laws, the loan proceeds were not treated as "income" until the properties in question were sold in the future. *Id.* at 208-211.

2. Petitioner proceeded to trial in 1992. At the jury instruction conference, the government proposed the use of Eleventh Circuit pattern jury instructions which specified that the materiality of petitioner's alleged misrepresentations and omissions was for the *court* — not the jury — to decide. Petitioner's counsel objected on the ground that materiality should be decided by the jury. J.A. 165-166. The trial court overruled petitioner's objections. J.A. 166-167. While the trial court instructed the jury that materiality was an element of the offenses charged (J.A. 249), the court also "instructed the jury that if it found beyond a reasonable doubt that the alleged statements, representations, or promises were false, it need not consider whether they were material because materiality was not an issue for the jury to decide. The court entered its own findings regarding materiality outside the presence of the jury. Petitioner timely objected to the court's findings and its failure to submit the issue of materiality to the jury." Pet. App. 3a. See also J.A. 249, 251-252, 252-253, 256. During the trial, the trial court dismissed three counts of the indictment. J.A. 20. The jury also acquitted petitioner of eight charges relating to the submission of inflated appraisals, but convicted him on all other counts, including the mail, wire, bank and tax fraud counts. J.A. 27.

3. On June 19, 1995, while petitioner's direct appeal to the Eleventh Circuit was pending, this Court decided *United States* v. *Gaudin*, 515 U.S. 506 (1995), which held that the Constitution provides a criminal defendant with the "right to have the jury decide materiality." *Id.* at 511. On the basis of *Gaudin*, petitioner argued to the court of appeals that his convictions for mail, wire, bank and tax fraud all should be vacated because materiality is an element of each of those statutory offenses, and because the trial court's directed verdict on the element of materiality deprived him of the constitutional right to have the jury decide every element of the charged offenses.

The Eleventh Circuit affirmed petitioner's convictions. As to the tax fraud conviction under 26 U.S.C. § 7206(1), the Eleventh Circuit acknowledged that under *Gaudin*, the district court "erred in not submitting the element of materiality to the jury." Pet. App. 11a. However, following circuit precedent, the court of appeals held that "*Gaudin* errors do not require automatic reversal but are subject to harmless error analysis." Pet. App. 11a n.10. Specifically, in *United States* v. *Fern*, 117 F.3d 1298 (11th Cir. 1997), the Eleventh Circuit had held that "a *Gaudin* error does not fall within that limited class of errors known as 'structural errors,' *e.g.*, errors 'affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.' To the contrary, a *Gaudin* error is more correctly viewed as analogous to improperly instructing the jury on an element of the offense, an error which is subject to harmless error analysis." *Id.* at 1307 (quoting *Johnson* v. *United States*, 117 S. Ct. 1544, 1550 (1997)).

Having found that the trial court's *Gaudin* error was subject to harmless-error review, the court of appeals proceeded to hold that the error was harmless "[b]ecause materiality was not in dispute with respect to Neder's tax fraud offense, [and thus] the district court's *Gaudin* error 'did not contribute to the verdict obtained.'" Pet. App. 13a (quoting *Yates* v. *Evatt*, 500 U.S. 391, 403 (1991)).

The Eleventh Circuit also affirmed petitioner's mail, wire and bank fraud convictions, but on different grounds. Citing *United States* v. *Wells*, 519 U.S. 482 (1997), the court of appeals held that the trial

court's directed finding of materiality did not violate petitioner's rights under *Gaudin* because materiality is not an element of those offenses. The court held that materiality is not an element of the mail and wire fraud statutes (18 U.S.C. §§ 1341 & 1343) because they "do not contain the word 'material.' Further, § 1341 was enacted as part of the recodification of the federal criminal code in 1948, and § 1343 was patterned after § 1341. Based on these factors considered in *Wells*, we conclude that materiality is not an element of fraud offenses in §§ 1341 and 1343." Pet. App. 7a. The court reached the same conclusion as to the bank fraud statute (18 U.S.C. § 1344), because "its language, like § 1343, was patterned after § 1341." *Id.* at 9a.

The Eleventh Circuit acknowledged that unlike the statute in *Wells* (18 U.S.C. § 1014), which prohibits "false statements," §§ 1341, 1343 and 1344 punish a "scheme or artifice" either "to defraud" or to "obtain[]" money or property "by means of false or fraudulent pretenses, representations, or promises." However, rejecting the Ninth Circuit's contrary holding in *United States* v. *Nash*, 115 F.3d 1431, 1436 (1997), cert. denied, 118 S. Ct. 1054 (1998), the court held that the textual differences between § 1014 and §§ 1341, 1343 and 1344 were irrelevant under *Wells*:

> We disagree with the Ninth Circuit's analysis that since the term "representation" included "some notion of materiality at common law," this indicates that Congress intended for materiality to be an element of the bank fraud statute. * * * This ignores that Congress now has employed the terms "material representation" and "material misrepresentation" in other statutes. The fact that Congress uses the term "material" in conjunction with "representation" or "misrepresentation" in some statutes but not in others rebuts any presumption that Congress now intends to make materiality an element under a statute whenever it employs the term "representation" in that statute.

Pet. App. 9a. The court also rejected the view that "there is a materiality aspect to the determination whether the acts of an accused give rise to a scheme to defraud." *Id.* at 7a n.4 (citing *United States*

v. *Cochran*, 109 F.3d 660, 667 n.3 (10th Cir. 1997)). Finally, the court rejected the argument that because § 1344 targets "fraud," it necessarily requires proof of materiality. According to the Eleventh Circuit, "[t]his approach is inconsistent with *Wells*, which disfavors inferring a materiality requirement where the statutory language does not expressly include one." Pet. App. 10a. Having concluded that materiality is not an element of §§ 1341, 1343 and 1344, the court of appeals held that the failure of the jury to decide the element of materiality as to those offenses did not violate *Gaudin*, and thus affirmed petitioner's mail, wire and bank fraud convictions.

SUMMARY OF ARGUMENT

I. At issue in this case is whether it can ever be harmless error for a trial court to direct a verdict in favor of the prosecution on an element of a charged offense — that is, for a person to stand convicted of a crime even though the jury never found him guilty beyond a reasonable doubt as to every element of the crime. The Eleventh Circuit answered this question in the affirmative, holding that the trial court's directed verdict on the materiality element of the tax fraud charges was subject to harmless-error review because, in the view of the court of appeals, "materiality was not in dispute regarding Neder's tax fraud offense," and therefore "the district court's *Gaudin* error 'did not contribute to the verdict obtained.'" Pet. App. 12a (quoting *Yates* v. *Evatt*, 500 U.S. 391, 403 (1991)). The court thus "filled the gaps" in the jury's verdict and supplied the missing factual findings that the jury never made, based on nothing more than its own views concerning the record evidence. As we demonstrate below, the court of appeals' decision utterly disregards the right to trial by jury and patently misapplies this Court's harmless-error decisions, which confirm that harmless-error review is impermissible where the jury has not rendered a verdict on every element of the offense charged.

Under *Chapman* v. *California*, 386 U.S. 18 (1967), and its progeny, the harmless-error doctrine applies only where the jury actually has rendered a complete verdict on every element of the offense, and may then be used only to gauge whether the constitutional error contributed to the verdict *actually entered*. In this case, the court of appeals unhinged the harmless-error doctrine, using

it to *supply* factual findings that the jury never made on an element that the district court explicitly removed from the jury's consideration. Such misuse of the harmless-error doctrine squarely violates the Court's unanimous decision in *Sullivan* v. *Louisiana*, 508 U.S. 275, 280 (1993), in which this Court made clear that where a jury fails to render a complete verdict, "the entire premise of *Chapman* review is simply absent." Thus, "the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which the harmless-error scrutiny can operate." *Ibid.* (emphasis in original). In this case, the court of appeals did precisely what *Sullivan* forbids.

The court of appeals justified its use of the harmless-error doctrine by finding that the materiality element of the tax fraud charges was "not in dispute," *i.e.*, based on nothing more than the court's own subjective perception of the record evidence. It has firmly been established for more than half a century, however, that a court may *never* direct a verdict of guilt regardless of how "overwhelming" the evidence may seem. Where, as here, the trial court has directed a verdict of guilt on an element of the offense charged, and the jury thus has failed to render a complete verdict on every element of the crime, the harmless-error doctrine has no application. In such a case, regardless of how "overwhelming" the evidence might appear to a reviewing court, "[t]he most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt — not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough." *Sullivan*, 508 U.S. at 280.

II. The federal mail fraud, wire fraud, and bank fraud statutes each prohibit a "scheme or artifice to defraud." 18 U.S.C. §§ 1341, 1343, 1344. This language, which Congress used when it first enacted the mail fraud statute in 1872, compels the conclusion that the statutes prohibit only schemes involving a *material* misrepresentation or omission.

It is a "cardinal rule of statutory construction" (*Molzof* v. *United States*, 502 U.S. 301, 307 (1992)) that this Court "presume[s] that

Congress incorporates the common-law meaning of the terms it uses if those terms * * * have accumulated settled meaning under * * * the common law and the statute [does not] otherwise dictate." *United States* v. *Wells*, 519 U.S. 482, 491 (1997) (internal quotation omitted). The word "defraud" thus brings with it the common-law elements of fraud, which have always included materiality. See, *e.g.*, *Smith* v. *Richards*, 38 U.S. (13 Pet.) 26, 39 (1839) (in action "to set aside a contract for fraud," "the misrepresentation must be of something material"); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 579 (1996) ("Actionable fraud requires a material misrepresentation or omission").

The presumption that statutory language bears its common-law meaning can be overcome, but only if "Congress has unequivocally expressed an intent to the contrary." *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 330 (1981). In this case, every indication leads to the conclusion that Congress meant the word "defraud" to bear its common-law meaning, including the materiality element. The early criminal analog of civil fraud that existed in 1872 (the crime of "false pretenses") required proof of materiality, and the legislative history, the early case law, and the surrounding statutory language all confirm a similar understanding of the mail fraud statute.

But even if there were any ambiguity as to the meaning of the mail fraud, wire fraud, and bank fraud statutes, they would still have to be interpreted to include a materiality element for at least two other reasons. First, because the word "defraud" so strongly implies that materiality is required, any other reading of the statutes would deprive citizens of their right "to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). Second, because "text, structure, and history fail to establish that the Government's position is unambiguously correct," the rule of lenity also requires that this Court "resolve the ambiguity in [petitioner's] favor." *United States* v. *Granderson*, 511 U.S. 39, 54 (1994).

ARGUMENT

I. A DIRECTED VERDICT OF GUILT ON AN ELEMENT OF A CHARGED OFFENSE CANNOT CONSTITUTIONALLY BE SUBJECT TO HARMLESS-ERROR REVIEW.

"The right to have a jury make the ultimate determination of guilt has an impressive pedigree." *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995) (citing 4 W. BLACKSTONE, COMMENTARIES *343; 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 541 n.2 (4th ed. 1873)). As this Court has observed:

> It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689.

Duncan v. *Louisiana*, 391 U.S. 145, 151 (1968). The right to a jury trial, in fact, was the only right proclaimed in each of the twelve state constitutions in existence prior to the Constitutional Convention, and is the only guarantee appearing in both the Constitution and the Bill of Rights. A.W. Alschuler & A.G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870 (1994).

A criminal defendant's right to trial by jury "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan* v. *Louisiana*, 508 U.S. 275, 277 (1993). The right is all-encompassing, "giv[ing] a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of *every element* of the crime with which he is charged." *Gaudin*, 515 U.S. at 522-523 (emphasis added). As this Court held in *In re Winship*, 397 U.S. 358 (1970), "'[n]o man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences,

to say that the evidence before them * * * is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.'" *Id.* at 363 (quoting *Davis* v. *United States*, 160 U.S. 469, 493 (1895)).

In this case, it is undisputed that petitioner's constitutional right to a jury determination of guilt or innocence was violated by the trial court's directed verdict of guilt on the materiality element of the tax fraud charges against him.[1] The court of appeals declared this constitutional violation "harmless" based upon its *own* factual finding that the element in question (materiality) was "not in dispute." Pet. App. 12a. The Eleventh Circuit's threshold decision to engage in harmless-error review, however, misapplied this Court's harmless-error decisions, which consistently have emphasized that the doctrine may not be used by reviewing courts to supply findings of guilt that the jury never made. Equally important, the court of appeals also disregarded this Court's decision in *Sullivan*, which held that where (as here) the jury has not rendered a complete verdict on every element of the offense charged, the harmless-error doctrine has no application. The court of appeals' decision to engage in harmless-error review must be reversed.

A. Harmless-Error Review Cannot Be Used To Supply Factual Findings On Elements That Were Removed Explicitly From The Jury's Consideration.

This Court's harmless-error jurisprudence consistently reflects the fundamental principle that the harmless-error doctrine only can be applied when the jury has rendered a complete verdict on every element of the offense charged. Without such a verdict, a reviewing court is no more entitled to fill the gaps in the jury's verdict than it would to direct a verdict of guilt (which is precisely what occurred below). In either case, the trial court's error plainly qualifies as

[1] The jury also convicted petitioner of mail, wire and bank fraud without any finding as to the materiality of his alleged representations or omissions. If, as petitioner contends (see Section II, *infra*), materiality is an element of those offenses, petitioner's conviction on those charges must be reversed for the same reason.

"structural" error, for there is nothing a reviewing court can do under the Constitution that would allow it to declare the error "harmless."

1. From its first articulation in *Chapman* v. *California*, 386 U.S. 18 (1967), the constitutional harmless-error doctrine has been carefully limited to those cases in which an otherwise valid conviction has been entered, and then only to avoid "reversal of the conviction if the State could show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Sullivan*, 508 U.S. at 279 (quoting *Chapman*, 386 U.S. at 24). See also *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986). As *Chapman* explained, whenever a claim of harmless error is made, the court must address two distinct questions: "(1) can the error be held to be harmless, and (2) if so, was the error harmless in this case?" 386 U.S. at 20. If the appellate court answers the first question in the negative, the error is one that cannot be harmless under the Constitution, rendering the second question moot and ending the harmless-error inquiry regardless of the strength of the evidence. See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993).

Under *Sullivan*, the jury's failure to render a complete verdict on the tax fraud charges against petitioner is an error of such constitutional magnitude that it cannot be declared harmless. As *Sullivan* explained, "[h]armless-error review looks * * * to the basis on which 'the jury actually rested its verdict.'" 508 U.S. at 279 (quoting *Yates* v. *Evatt*, 500 U.S. 391, 404 (1991)).[2] By focusing solely on the verdict actually entered by the jury,

> the question [*Chapman*] instructs the reviewing court to consider is *not* what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. * * * The inquiry, in other words, is not

[2] Accord R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 21 (1970) ("It is one thing for an appellate court to determine that a verdict was or was not affected by error. It is quite another for an appellate court to become in effect a second jury to determine whether the defendant is guilty").

> whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict *actually rendered* in this trial was surely unattributable to the error.

Ibid. (emphasis added). It follows, then, that the harmless-error doctrine applies *only* where the jury has "actually entered" a complete guilty verdict; it is *not* a license for appellate courts to supply a verdict, or a portion thereof, that the jury never entered. As *Sullivan* put it, for an appellate court "to hypothesize a guilty verdict that was never in fact rendered — no matter how inescapable the findings to support that verdict might be — would violate the jury-trial guarantee." *Ibid.*

The foregoing principles compel the reversal of petitioner's tax fraud conviction because the jury that purportedly convicted petitioner of tax fraud did not find an element of that offense. See, *e.g.*, *United States* v. *DiRico*, 78 F.3d 732, 737 (1st Cir. 1996) (holding that *Gaudin* error in tax fraud case was not subject to harmless error review because materiality was not decided by the jury). The Constitution "require[s] criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Gaudin*, 515 U.S. at 510. Without such a determination by the jury, "there has been no jury verdict within the meaning of the Sixth Amendment." *Sullivan*, 508 U.S. at 280. There is also, then, "no *object*, so to speak, upon which the harmless-error scrutiny can operate." *Ibid.* (emphasis in original).

2. For an appellate court to declare the trial court's removal of an element of an offense harmless error based on its own view of the evidence concerning that element (as the Eleventh Circuit did below) is tantamount to affirming a directed verdict against the defendant on that element. In fact, that is *precisely* what occurred here. The trial court below not only instructed the jury that materiality "is not a matter for you to decide"; it actually decided materiality *itself*, directing a verdict in favor of the prosecution on that element. J.A. 166-167, 249, 251-252, 252-253, 256. The Constitution forbids such usurpation of the jury's function.

It is axiomatic that "although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan*, 508 U.S. at 277.[3] The prohibition against directed verdicts of guilt "stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases." *Rose* v. *Clark*, 478 U.S. 570, 578 (1986). As this Court explained in *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977), this categorical rule reaffirms the constitutional role of the jury as the exclusive finder of fact:

> In a jury trial the primary finders of fact are the jurors. Their overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction. For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction.

Id. at 572-573 (citations omitted).

To direct a verdict of guilt on an element of a charged offense, and thus foreclose the jury's ability to decide that element, is an error of such constitutional dimension that it defies harmless-error scrutiny. Indeed, this Court confirmed in *Rose* that

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[3] Accord, *e.g.*, *Sparf* v. *United States*, 156 U.S. 51, 105 (1895) ("it is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offense charged, or of any criminal offense less than that charged"); *id.* at 174 (Gray, J., dissenting) ("the court can never order the jury to convict, for no one can be found guilty but by the judgment of his peers"); *Connecticut* v. *Johnson*, 460 U.S. 73, 83 (1983) (plurality) ("The Court consistently has held that 'a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict * * * regardless of how overwhelmingly the evidence may point in that direction'") (quoting *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977)).

> harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury. * * * This rule stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases. * * * Where that right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; *the error in such a case is that the wrong entity judged the defendant guilty*.

478 U.S. at 578 (emphasis added) (citing *Martin Linen*, 430 U.S. at 572-73; *Carpenters & Joiners* v. *United States*, 330 U.S. 395, 408 (1947); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968)). See also *Arizona* v. *Fulminante*, 499 U.S. 279, 294 (1991) (White J., dissenting) (directed verdict for the State is among the "constitutional errors that invalidate a conviction even though there may be no reasonable doubt that the defendant is guilty and would be convicted absent the trial error"); R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 21 (1970) (same). Simply put, the complete removal of an element from the jury's consideration is an error that can never be regarded as harmless. To hold otherwise "would be to dispense with trial by jury." *California* v. *Roy*, 117 S. Ct. 337, 339 (1996) (Scalia, J., concurring).

3. Although most errors that occur during the trial process will be amenable to harmless-error scrutiny, there are certain "structural" errors that so fundamentally impair the right to a fair trial that they "defy analysis by 'harmless-error' standards" *(Fulminante*, 499 U.S. at 307-309), and thus "require reversal without regard to the evidence in the particular case." *Rose*, 478 U.S. at 577. A conviction rendered without a verdict of guilty beyond a reasonable doubt on every element of the offense charged is among those errors.

In *Fulminante*, this Court "distinguished between, on the one hand, 'structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards,' and, on the other hand, trial errors which occur 'during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the

context of other evidence presented.'" *Sullivan*, 508 U.S. at 281 (quoting *Fulminante*, 499 U.S. at 307-309). An incomplete jury verdict is not attributable to the presentation of evidence. And like other errors that this Court has regarded as structural, there is nothing that a reviewing court can look to that would allow it to declare the error harmless since the court cannot constitutionally predict what the jury's verdict would have been if a complete verdict had been entered. As the Court held in *Sullivan*, where the jury's verdict is incomplete, "[t]he most an appellate court can conclude is that a jury *would surely have* found petitioner guilty beyond a reasonable doubt — not that the jury's *actual* finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. *That is not enough*." *Sullivan*, 508 U.S. at 280 (emphasis added). Accord *Cabana* v. *Bullock*, 474 U.S. 376, 384-385 (1986) ("Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime").

Sullivan held that a defective reasonable doubt instruction could not be reviewed for harmless error because the error produced an incomplete verdict that fundamentally deprived the defendant of his right to a jury determination of guilt or innocence:

> Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the [structural] sort, the jury guarantee being a "basic protection" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. * * * The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

508 U.S. at 281-282 (quoting *Rose*, 478 U.S. at 577; *Duncan*, 391 U.S. at 155). Accord *Duncan*, 391 U.S. at 149 ("trial by jury in criminal cases is fundamental to the American scheme of justice"); *Carella* v. *California*, 491 U.S. 263, 268 (1989) (Scalia, J., concurring) (the right to a jury determination of guilt "is a structural guarantee that 'reflect[s] a fundamental decision about the exercise of official power — a reluctance to entrust plenary powers over the life

and liberty of the citizen to one judge or to a group of judges'") (quoting *Duncan*, 391 U.S. at 156).

Just like the defective reasonable doubt instruction in *Sullivan*, the trial court's explicit removal of materiality from the jury's consideration below produced a constitutionally incomplete verdict. When such an error occurs, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence * * * and no criminal punishment may be regarded as fundamentally fair." *Rose*, 478 U.S. at 577-578. If anything, the district court's directed verdict below was even *more* a "structural" error than that in *Sullivan*, which "neither * * * removed an element of the offense from the jury's consideration [n]or prevented the jury from considering certain evidence." *Sullivan*, 508 U.S. at 283 (Rehnquist, C.J., concurring). Here, by contrast, that is precisely what occurred.[4]

In short, *Sullivan* compels the conclusion that a trial court's removal of an element is a structural error because, in such a circumstance, "[a] reviewing court can only engage in pure speculation — its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty.'" *Sullivan*, 508 U.S. at 281 (quoting *Rose*, 478 U.S. at 578).[5]

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[4] See G. Chernack, Note, *Silence Cannot Be Harmless:* United States v. Rogers, 106 YALE L.J. 2305, 2309 (1997) ("In *Sullivan*, the jury had considered all the issues but simply had not applied the proper standard; in *Rogers*, the jury failed to consider a necessary element of the offense. It is difficult to imagine why harmless-error review should be applied in the latter situation when such review is inappropriate in the former. By completely undermining the promise of trial by jury, an omitted instruction should lead to automatic reversal").

[5] See also J. Greabe, *Spelling Guilt Out of a Record? Harmless-Error Review of Conclusive Mandatory Presumptions and Elemental Misdescriptions*, 74 B.U. L. REV. 819, 850 (1994) ("The very same logic in [*Sullivan*] compels the conclusion that a deprivation of the rights to have the jury make all elemental determinations and to consider all admitted, elementally relevant evidence — rights as much a part of the Sixth Amendment's jury-trial guarantee as the right to a jury verdict of guilty beyond a reasonable doubt — constitutes structural error").

Accord *Carella*, 491 U.S. at 269 (Scalia, J., concurring) (where essential factual issue is omitted, "the problem would not be cured by an appellate court's determination that the record evidence unmistakably established guilt, for that would represent a finding of fact by judges, not by a jury"). The absence of an actual jury verdict on each essential element of the offense thus "unquestionably qualifies as 'structural error.'" *Sullivan*, 508 U.S. at 281-282.

B. This Court's Instructional Error Decisions Make Clear That The Harmless-Error Doctrine Is Inapplicable When The Jury Has Failed To Render A Complete Verdict On Every Element Of The Offense Charged.

1. In confronting the question whether, and to what extent, instructional errors are amenable to harmless-error scrutiny, the Court consistently has adhered to the fundamental principle that an appellate court may not serve as the finder of fact. In *Carpenters & Joiners* v. *United States*, 330 U.S. 395 (1947), for instance, the trial court failed properly to instruct the jury that the defendants could be found guilty of conspiracy to violate the antitrust laws only if the defendants actively participated in the conspiracy. This Court reversed the conviction, despite clear record evidence that the defendants had in fact participated in the alleged conspiracy, expressly refusing to weigh the evidence to determine whether the conspiracy element had been established:

> We do not enter into an analysis of the evidence that was relied upon to show the participation of the unions in the conspiracy. * * * No matter how strong the evidence may be of an association's or organization's participation through its agents in the conspiracy, there must be a charge to the jury setting out correctly the limited liability under § 6 of such association or organization for acts of its agents. *For a judge may not direct a verdict of guilty no matter how conclusive the evidence.*

330 U.S. at 408-409 (emphasis added). The constitutional prohibition on directed guilty verdicts in criminal cases equally prohibits appellate courts from seeking to cure incomplete jury verdicts by finding that the evidence established the missing elements of guilt beyond a reasonable doubt. As Justice Scalia has explained:

> A defendant may assuredly insist upon observance of [the jury trial] guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State. That is also why in [*Carpenters*] the Court did not treat as harmless a jury instruction that mistakenly did not require express authorization or ratification to hold a union criminally liable for its officers' participation in an antitrust conspiracy — regardless of how overwhelming the evidence that authorization or ratification in fact existed.

Carella, 491 U.S. at 268-69 (concurring opinion) (citations omitted).

In contrast to the circumstances presented in *Carpenters*, it is possible that a jury, while misinstructed on an element, may nonetheless find the facts necessary to establish the proper element beyond a reasonable doubt. For instance, in *Pope* v. *Illinois*, 481 U.S. 497 (1987), the jury was instructed that it should base its determination whether the materials at issue were criminally obscene upon how ordinary adults in the State of Illinois would view the material. The Court ruled that this instruction was flawed under the First Amendment, because obscenity should be judged not from the perspective of "an ordinary member of any given community," but rather from that of "a reasonable person." *Id.* at 500-501. The Court remanded the case to the state appellate court to determine whether the error was harmless. *Id.* at 504.

Although finding that the erroneous jury instructions were subject to harmless-error scrutiny, *Pope* is fully consistent with the basic principle, reflected in *Carpenters*, that an appellate court may not supply a factual finding that the jury never made. As the *Pope* Court explained, when determining whether to engage in harmless-

error review, an appellate court in a misdescription case must determine whether "the facts that the jury necessarily found established guilt beyond a reasonable doubt." 481 U.S. at 503. What distinguished *Pope* from *Carpenters*, then, was that "the jurors [in *Pope*] were not precluded from considering" any element of the offense charged. *Ibid.* As Justice Scalia later explained, the error in *Pope* was subject to harmless-error review because "no rational juror could plausibly have found the magazines utterly lacking in value under a community standard and come to a different conclusion under a reasonable person standard." *Carella*, 491 U.S. at 271 (concurring opinion). Thus, the appellate court in *Pope* validly could conclude that the jury actually found the required element notwithstanding its misdescription in the jury instructions.

Read in tandem, *Carpenters* and *Pope* demonstrate that, at least analytically, the wholesale omission of an element is "as easily characterized as a 'misdescription of an element' of the crime, as it is characterized as an error of 'omission.'" *Roy*, 117 S. Ct. at 339. See also *Johnson* v. *United States*, 117 S. Ct. 1544, 1550 (1997) (same). Omissions and misdescriptions each can "deprive[] the jury of its factfinding role" and thus will "circumscribe the availability of harmless-error analysis." *Carella*, 491 U.S. at 269, 270 (Scalia, J., concurring). But in either event, the instructional error can be subject to harmless-error scrutiny *only* where the facts found by the jury under the instructions actually given "are so closely related" to the element omitted by the trial court "that no rational jury could find those facts without also finding" the facts necessary to establish the omitted element beyond a reasonable doubt, such that "making those findings is functionally equivalent to finding the [omitted] element." *Sullivan*, 508 U.S. at 281. Accord B. Rosenberg, *The Effect of* Sullivan v. Louisiana *on Harmless Error Analysis of Jury Instructions That Omit an Element of the Offense*, 29 RUTGERS L.J. 315, 323-26 (1998).

In short, instructional errors concerning a particular element "can be harmless only if the jury verdict on other points effectively embraces [the element] or if it is impossible, upon the evidence, to have found what the verdict did find without finding this point as

well." *Roy*, 117 S. Ct. at 339-340 (Scalia, J., concurring). "The error is harmless in this situation because it is beyond a reasonable doubt that the jury found the facts necessary to support the conviction." *Yates*, 500 U.S. at 406 n.10. On the other hand, where, as here, the erroneous instructions allow the jury to convict *without* finding "the facts necessary to support the conviction," the error simply is not subject to harmless-error scrutiny.

2. While analytically similar, instructional errors involving omissions, misdescriptions and presumptions will likely differ in the frequency with which they are amenable to harmless-error review — that is, in the frequency with which it can be determined that the jury actually found the element despite the error. Logically, it will be far less likely in the case of an omission that the jury's verdict on other elements necessarily embraced the omitted element because, by definition, the jury will have received *no* direction as to that element.

Erroneous presumptions are different. "Because a presumption does not remove [an element] from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue." *Rose*, 478 U.S. at 580 n.8 (quoting *Connecticut* v. *Johnson*, 460 U.S. at 95 n.3 (Powell, J., dissenting)). "When a jury is instructed to presume [an element] from predicate facts, it still must find the existence of those facts beyond a reasonable doubt." *Id.* at 580. In other words, the record may show that the erroneous presumption was unimportant in relation to everything else the jury considered on the issue in question, such that "[a] reviewing court may thus be able to conclude that the presumption played no significant role in the finding of guilt beyond a reasonable doubt." *Sullivan*, 508 U.S. at 281 (citing *Yates*, 500 U.S. at 402-406). Likewise, in the case of a simple misdescription (as in *Pope*), the erroneous instruction may be simply "superfluous" to the extent that "the predicate facts conclusively establish" the ultimate fact. See *Rose*, 478 U.S. at 580-581.

In contrast to an erroneous presumption (and many misdescriptions), the complete removal of an element by the trial court deprives the jury of an opportunity to find the element required for conviction. In such a case, it would be impossible for a reviewing

court to determine that the jury actually found the proper element despite the instructional error — particularly where, as here, the trial court explicitly directed the jury *not* to consider that element and decided that element itself. If a conclusive presumption "tend[s] to deter a jury from considering any evidence for the presumed fact beyond the predicate evidence" (*Yates*, 500 U.S. at 406 n.10), the complete *removal* of an element completely precludes the jury's consideration of that element.

When faced with the omission of an element from the jury instructions, a reviewing court can find that the jury found the facts establishing the omitted element only if the jury instructions *actually given* necessarily embraced the missing element. As Justice Scalia has explained, *Pope* was such a case because the jury could not have found a magazine obscene under a "community" standard without also finding it obscene under a "reasonable person" standard. *Carella*, 491 U.S. at 271 (concurring opinion). In *Carpenters*, by contrast, a finding of guilt in accordance with the jury charge did not require the jury to find that the defendants actively engaged in a conspiracy beyond a reasonable doubt. *Carpenters*, 330 U.S. at 407 & n.19. Notwithstanding the apparent strength of the evidence, nothing the jury was asked to consider in *Carpenters* required it to make the requisite finding. *Id.* at 408.

In short, the focus in each of this Court's instructional error cases always has been on what the jury actually found — not on what the jury hypothetically would have found had it been instructed correctly. See *Sullivan*, 508 U.S. at 279-280. Indeed, *never* has this Court allowed a trial or reviewing court to decide a factual element of a crime that the jury did not consider. Under *Sullivan*, "a criminal defendant is constitutionally entitled to a jury verdict that he is guilty of the crime, and absent such a verdict the conviction must be reversed, 'no matter how inescapable the findings to support that verdict might be.'" *Roy*, 117 S. Ct. at 339 (Scalia, J., concurring) (quoting *Sullivan*, 508 U.S. at 279). In this case, it is undisputed that the jury *never* made any findings concerning the materiality of any of the representations or omissions alleged by the government. Under

Gaudin, this was clearly a question for the jury to decide. *Sullivan* thus compels the reversal of petitioner's convictions.

C. Removal Of An Element From The Jury's Consideration Cannot Be Cured By An Appellate Court's Finding That The Element Was "Not In Dispute," Or That The Evidence Of Guilt Was "Overwhelming"

The Eleventh Circuit justified its use of the harmless-error doctrine by finding that the materiality element of the tax fraud charges "was not in dispute." Pet. App. 12a. This "finding," however, simply reflects the court of appeals' own perception of the evidence at trial. Petitioner did not admit to *any* element of the offenses with which he was charged. Nor did he plead guilty to any charges. Thus, the fact that the court of appeals may have viewed the evidence concerning materiality as "not in dispute," or even "overwhelming," provided no constitutional basis for invoking harmless-error review.

1. An accused who (like petitioner) wishes to contest the charges against him need only enter a general plea of not guilty. "In the federal courts, '[a] simple plea of not guilty * * * puts the prosecution to its proof as to *all* elements of the crime charged.'" *Estelle* v. *McGuire*, 502 U.S. 62, 69-70 (1991) (quoting *Mathews* v. *United States*, 485 U.S. 58, 64-65 (1988)) (emphasis added).[6] After pleading not guilty, even a defendant who breaks down and openly admits his or her guilt on the stand is "justified * * * in defending solely in reliance on the presumption of his innocence and the State's burden of proof." *Connecticut* v. *Johnson*, 460 U.S. at 87 n.16 (plurality opinion).

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[6] Accord *Old Chief* v. *United States*, 117 S. Ct. 644, 659 (1997) (O'Connor, J., dissenting) ("[a]t trial, a defendant may * * * choose to contest the Government's proof on every element; or he may concede some elements and contest others; or he may do nothing at all. Whatever his choice, the Government still carries the burden of proof beyond a reasonable doubt on each element"); *Roe* v. *United States*, 287 F.2d 435, 440 (5th Cir. 1961) (a "plea of not guilty puts all in issue, even the most patent truths").

Thus, regardless of whether materiality was the central focus of the trial on petitioner's tax fraud charges, the government clearly had the burden of proving materiality beyond a reasonable doubt, and the jury alone was constitutionally required to decide whether that element was established.

2. That a reviewing court may view an element removed by the trial court from the jury's consideration as "not in dispute," or the evidence of guilt concerning that element as "overwhelming," provides no justification for engaging in harmless-error review. Where, as here, the trial court has directed a verdict for the State on a particular element, the strength of the evidence on that element is completely irrelevant. As this Court held in *Sullivan*, a trial court "may not direct a verdict for the State, *no matter how overwhelming the evidence*." 508 U.S. at 277 (emphasis added).

Whether a particular error is amenable to harmless-error scrutiny has nothing to do with the nature or strength of the *evidence*. It depends entirely on the nature of the *error*. For this reason, a structural error is "not curable by overwhelming record evidence of guilt." *Carella*, 491 U.S. at 270 (Scalia, J., concurring) (citing *Carpenters*, 330 U.S. at 408-409). Under *Chapman*, the first question an appellate court must ask is whether the error is even suitable to harmless-error scrutiny. Only if the harmless-error doctrine can constitutionally be applied may the appellate court then address whether, in light of the evidence adduced at trial, the error actually was harmless. *Sullivan*, 508 U.S. at 280. For this reason, a "structural" error that "def[ies] analysis by 'harmless-error' standards" (*Fulminante*, 499 U.S. at 307-309), "require[s] reversal without regard to the evidence in the particular case." *Rose*, 478 U.S. at 577.

Last Term, in *Rogers* v. *United States*, 118 S. Ct. 673 (1998), even the government conceded "that language in some of this Court's recent harmless-error decisions indicates that, as a general matter, it is inappropriate to rely on 'overwhelming evidence' to determine what a jury would have found in the absence of an error, as distinguished from what the jury actually did find despite that error." Brief for the United States, *Rogers* v. *United States*, No. 96-1279, at 24 (citing

Sullivan, 508 U.S. at 280; *Yates*, 500 U.S. at 404; *Roy*, 118 S. Ct. at 389 (Scalia, J., concurring)).

Where the jury's verdict is incomplete, the harmless-error doctrine is inapplicable regardless of how "overwhelming" the evidence of guilt may seem for the simple reason that there is *nothing* a reviewing court can do under the Constitution that would allow it to declare the error "harmless." Not even the presence of "overwhelming" evidence can mitigate the total removal of an element since no amount of evidence can show that the jury actually found what it was never directed to find (or, in this case, was told *not* to find). See *Carella*, 491 U.S. at 270 (Scalia, J., concurring) ("misdescription of an element of the offense has * * * been held not curable by overwhelming record evidence of guilt") (citing *Carpenters*, 330 U.S. at 408-409). Thus, where the jury fails to render a verdict on every element of the offenses charged, reversal is required "no matter how inescapable the findings to support that verdict might be." *Sullivan*, 508 U.S. at 279.

In deciding to apply the harmless-error doctrine to the trial court's directed verdict on the element of materiality, the Eleventh Circuit mistakenly assumed that "[b]ecause materiality was not in dispute with respect to Neder's tax fraud offense, the district court's *Gaudin* error 'did not contribute to the verdict obtained.'" Pet. App. 13a (quoting *Yates*, 500 U.S. at 403). In making this assumption, the court of appeals plainly misunderstood the nature of the constitutional error that occurred.[7] As this Court explained in *Sullivan*, where the

[7] The Eleventh Circuit also misapplied this Court's decision in *Yates*. As discussed *supra* at 20-21, *Yates* did not involve an omitted element, but rather a defective presumption. Even in that context, *Yates* confirmed that "[t]o satisfy *Chapman*'s reasonable-doubt standard, it will not be enough that the jury considered evidence from which it *could have* come to the verdict without reliance on the presumption. Rather, the issue under *Chapman* is whether the jury *actually rested* its verdict on evidence establishing the presumed fact beyond a reasonable doubt, *independently of the presumption*." 500 U.S. at 404 (emphasis added). As explained *supra* at 21-22, it would be impossible, in a case like this one, for a reviewing court to find that the jury

jury has not rendered a verdict on every element of the charged offense, the harmless-error doctrine is inapplicable because the "error" is that no constitutional "verdict" was rendered in the first place. For a reviewing court to declare such an error harmless would mean that the "the wrong entity judged the defendant guilty." *Rose*, 478 U.S. at 578. Contrary to the Eleventh Circuit's apparent assumption, when the trial court completely removes an element from the jury's consideration, the error necessarily "contribute[s] to the verdict obtained."

If anything, the court of appeals' decision itself confirms that without a complete verdict by the jury on every element, the *only* way that an appellate court can purport to remedy the removal of an element is by weighing the record evidence itself and guessing what the jury would have decided had it considered the omitted element. As this Court explained in *Sullivan*, that is why the harmless-error doctrine cannot be applied to an incomplete jury verdict:

> Since * * * there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless.

Sullivan, 508 U.S. at 280 (citing *Yates*, 500 U.S. at 413-414 (Scalia, J., concurring); *Bollenbach* v. *United States*, 326 U.S. 607, 614 (1946)). To allow an appellate court to declare the removal of an element harmless based on the court's perception that the element was established by "overwhelming" evidence, or that the element was "not in dispute," would be tantamount to allowing directed verdicts

"actually rested" its verdict on evidence regarding an element that the trial court explicitly removed from the jury's consideration. By taking the element of materiality away from the jury, there simply was "nothing in the instruction[s] [that] would have directed the jury, or even permitted it, to consider and apply [the evidence pertaining to that element] in reaching its verdict." *Carella*, 491 U.S. at 269 (Scalia, J., concurring).

of guilt based on "overwhelming evidence." See *Sullivan*, 508 U.S. at 280 ("[t]he Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal").

Where, as here, the trial court has taken an element completely away from the jury, and thus produced an incomplete jury verdict, "the problem would not be cured by an appellate court's determination that the record evidence established guilt, for that would represent a finding of fact by judges, not by a jury." *Carella*, 491 U.S. at 269 (Scalia, J., concurring). Thus, simply put, "[t]he absence of a formal verdict on [an element] can not be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise. To allow the error to be cured in that fashion would be to dispense with trial by jury." *Roy*, 117 S. Ct. at 339 (Scalia, J., concurring).[8]

[8] Accord, *e.g.*, *Connecticut* v. *Johnson*, 460 U.S. at 86 (plurality opinion) ("The fact that the reviewing court may view the evidence [on an element] as overwhelming is * * * simply irrelevant. To allow a reviewing court to perform the jury's function of evaluating the evidence * * * when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made"); *United States* v. *Hasting*, 461 U.S. 499, 516 (1983) (Stevens, J., concurring) ("A federal appellate court should not find harmless error merely because it believes that the other evidence is 'overwhelming'"); *Henderson* v. *Morgan*, 426 U.S. 637, 650 (1976) (White, J., concurring) ("It cannot be 'harmless error' wholly to deny a defendant a jury trial on one or all elements of the offense with which he is charged"); *Bollenbach*, 326 U.S. at 615 ("[i]n view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be").

D. Complete Removal Of An Element Requires Reversal To Preserve The Constitutional Right To A Jury Trial.

The court of appeals believed it was entitled to "fill the gaps" left open by a trial court's instructional errors based on its perception that the element omitted from the jury's verdict was "not in dispute" anyway. Pet. App. 12a. If upheld, such unprecedented use of the harmless-error doctrine would substantially and inexorably erode the Constitution's explicit jury trial guarantees. For this reason, it is imperative that the right to have "a jury determine, beyond a reasonable doubt, [a person's] guilt of every element of the crime with which he is charged" (*Gaudin*, 515 U.S. at 522-523) be rigidly enforced without exception.

Sullivan is the touchstone here precisely because of its explicit rejection of "earlier cases embracing the idea that the harmlessness of an error may be gauged simply through an appellate court's own assessment of guilt." H.T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1201 (1996).[9] Yet, despite *Sullivan's* unambiguous command, appellate courts have continued to use harmless-error review as a means of affirming the convictions of those persons whom the reviewing courts believe to be guilty. As Chief Judge Edwards explained, "the seductiveness of this approach is its chief defect, for, drawn in by its attractions, we have applied the harmless-error rule to such an extent that it is my impression that my colleagues and I are inclined to invoke it almost automatically where the proof of a defendant's guilt seems strong." *Id.* at 1170.

This Court observed in *Duncan* v. *Louisiana* that the right to trial by jury embodies "a profound judgment about the way in which law should be enforced and justice administered," with the jury serving as a structural safeguard "to prevent oppression by the Government" and to ensure "community participation in the determination of guilt or innocence." 391 U.S. at 155, 156. The

[9] Thus, as the Court recently pointed out in *Johnson* v. *United States*, 117 S. Ct. at 1550, where an essential element has been removed from the jury's consideration, *Sullivan* is "the case most closely on point."

Court also acknowledged the "impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice, an importance frequently recognized in the opinions of this Court." *Id.* at 153-54. Indeed, the right to a jury determination of guilt or innocence has long been regarded an essential safeguard against "the tyranny of popular magistrates in a popular government" (THE FEDERALIST NO. 83 (A. Hamilton) (C. Rossiter ed. 1961)), and "'a sacred part of our legal privileges.'" *Gaudin*, 515 U.S. at 513 (quoting 1 S. SMITH & T. LLOYD, TRIAL OF SAMUEL CHASE 34 (1805)).[10]

As first-hand observers of the trial process itself, jurors are uniquely suited to make the countless credibility and other factual determinations that are crucial to a fair and reliable assessment of guilt or innocence. Appellate judges, by contrast, necessarily are limited to a "dead" record, and thus are ill-equipped to resolve factual controversies or to make credibility determinations. As Justice Stevens put it, trial "testimony and accompanying exhibits are much more difficult to assimilate and fully comprehend from the cold record than in the living trial, and of course we do not have the opportunity to make assessments of the demeanor of the witnesses." *Colorado* v. *New Mexico*, 467 U.S. 310, 326 (1984) (dissenting opinion). Accord *Caldwell* v. *Mississippi*, 472 U.S. 320, 330 (1985); *United States* v. *Bayer*, 331 U.S. 532, 536-537 (1947).[11]

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[10] See also G. Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335, 1366 (1994) ("The defendant's Sixth Amendment right to a jury verdict dictates adoption of the harmless-error test that best limits appellate-level intrusion on the jury's factfinding role. It is worth remembering that if a court finds an error harmful, the remedy is a new trial, not a permanent release. Reversal for harmful error means only that the defendant will have a second chance at a fair result by a fair process").

[11] See also Edwards, *supra*, 70 N.Y.U. L. REV. at 1193-1194 ("The very nature of the appellate function leaves judges of the courts of appeals poorly equipped to make * * * guilt determinations. An appellate judge's view of the trial is limited to the record, and, as any observer of the judicial process is aware, many events of trial pass without casting so much as a shadow upon the printed transcript. The appellate judge cannot watch the demeanor of witnesses, listen to the intonations of their voices, or engage in any of the countless other observations that inhere in an assessment of credibility"); Mitchell, *supra*, 82 CAL. L. REV. at 1340, 1353 (same).

To preserve the sanctity of the jury as the exclusive finder of fact, the line establishing the respective domains of the judge and jury in the process of adjudicating guilt must be rigidly observed without regard to the perceived weight of the evidence. Requiring reversal where an element of the crime has been removed from the jury's consideration "is simply the price for assuring that the jury's role as the voice of the community's 'standards, morals [and] principles' is not stifled." Rosenberg, *supra*, 29 RUTGERS L.J. at 329 (quoting *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 n.15 (1968)). If appellate courts are given even the slightest latitude to review the record to "fill the gaps" in a jury verdict, as "minor" as those gaps may seem, there will be no principled means of preventing the complete erosion of the right to trial by jury. As Blackstone warned long ago, any "inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and . . . *though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.*" 4 W. BLACKSTONE, COMMENTARIES *344 (emphasis added).

In *Sullivan*, this Court strongly reaffirmed its commitment to the fundamental principle that it can never be harmless for a person to stand convicted of a crime when the jury has not found every element of the crime beyond a reasonable doubt. The Court should again confirm that that is where the constitutional line has been drawn, and hold that the court of appeals crossed it.

II. MATERIALITY IS AN ELEMENT OF THE FEDERAL MAIL FRAUD, WIRE FRAUD, AND BANK FRAUD STATUTES.

A. The Plain Language Of The Mail Fraud, Wire Fraud, And Bank Fraud Statutes Confirms That Materiality Is An Element Of Each Crime.

1. When Congress first enacted the mail fraud statute in 1872, it punished "any person having devised or intending to devise any scheme or artifice to defraud * * * by means of the post-office establishment" and making the requisite use of the mails.[12] The phrase "scheme or artifice to defraud" remains unchanged in the current mail fraud statute, 18 U.S.C. § 1341. Congress also incorporated the phrase without change into the wire fraud and bank fraud statutes, 18 U.S.C. §§ 1343 and 1344.[13] None of these statutes defines the phrase

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[12] The original mail fraud statute provided:

> That if any person having devised or intending to devise any scheme or artifice to defraud, [to] be effected by either opening or intending to open correspondence or communication with any other person (whether resident within or outside of the United States), by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice (or attempting so to do), place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, so misusing the post-office establishment, shall be guilty of a misdemeanor * * *.

Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323.

[13] The language of the three statutes is nearly identical. The only significant difference is the jurisdictional element, which under 18 U.S.C. § 1343 is the use of interstate wire facilities, and under 18 U.S.C. § 1344 is the involvement of a federally insured bank. Thus, this Court has recognized that the mail fraud and wire fraud statutes are to be interpreted *in pari materia*. *Carpenter* v. *United States*, 484 U.S. 19, 25 n.6 (1987). Likewise, the bank fraud statute, which was enacted in 1984, was "modeled

"scheme or artifice to defraud." Rather, Congress left "the matter of what conduct may constitute such a scheme for determination under other laws." *Parr* v. *United States*, 363 U.S. 370, 389 (1960).

The language chosen by Congress demonstrates that the statutes prohibit only schemes involving a *material* misrepresentation or omission — meaning one that "has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed." *Kungys* v. *United States*, 485 U.S. 759, 770 (1988) (internal quotations omitted).[14] It is a "cardinal rule of statutory construction" that the Court will assume, in the absence of evidence of a contrary congressional intent, that statutory language carries its settled common-law meaning. *Molzof* v. *United States*, 502 U.S. 301, 307 (1992). Here, every indication is that Congress, in using the phrase "scheme or artifice to defraud," had no intention of departing from the common law's long-held understanding that

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on the present wire and mail fraud statutes which have been construed by the courts to reach a wide range of fraudulent activity. Like these existing fraud statutes, the proposed bank fraud offense proscribes the conduct of executing or attempting to execute 'a scheme or artifice to defraud' or to take the property of another 'by means of false or fraudulent pretenses, representations, or promises.'" S. Rep. No. 98-225, at 378 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3519.

[14] In addition to a "scheme or artifice to defraud," the statutes also refer to a "scheme or artifice" employing "false or fraudulent pretenses, representations, or promises." This additional language does not furnish an independent basis of criminal liability. As this Court explained in *McNally* v. *United States*, 483 U.S. 350, 357-359 (1987), Congress added this language in 1909 merely to codify the holding in *Durland* v. *United States*, 161 U.S. 306, 313 (1896), that the mail fraud statute's prohibition on "scheme[s] or artifice[s] to defraud" reaches "representations as to the past or present, or suggestions and promises as to the future." See also *Pereira* v. *United States*, 347 U.S. 1, 8 (1954) ("The elements of the offense of mail fraud * * * are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme."). But even if this additional language had independent significance, it nevertheless would require proof of materiality by its own terms. See *infra* at 45-46.

"fraud" requires a material misrepresentation or omission. See *infra* at 32-35.

2. In *United States* v. *Wells*, 519 U.S. 482 (1997), this Court addressed whether materiality is an element of the "false statement" offense in 18 U.S.C. § 1014. In so doing, the Court "of course, presume[d] that Congress incorporates the common-law meaning of the terms it uses if those terms * * * have accumulated settled meaning under * * * the common law and the statute [does not] otherwise dictate." 519 U.S. at 491 (internal quotations omitted). As the Court has explained:

> where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

Morissette v. *United States*, 342 U.S. 246, 263 (1952). See also, *e.g.*, *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981) ("Where Congress uses terms that have accumulated settled meaning under * * * the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms"); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 59 (1911) ("where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense"). "'[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it.'" *Moskal* v. *United States*, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting) (quoting F. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)).

In *Wells*, the defendant made "no claims about the settled meaning of 'false statement' at common law," and this Court discerned no common-law meaning of the term "false statement" that supported a materiality requirement in § 1014. 519 U.S. at 491 &

n.10. Here, by contrast, the term "defraud" has a firm common-law meaning. As this Court recently noted in construing similar language:

> "[F]alse pretenses, a false representation, or actual fraud" carry the acquired meaning of terms of art. They are common-law terms, and * * * they imply elements that the common law has defined them to include. Congress could have enumerated their elements, but Congress's contrary drafting choice did not deprive them of a significance richer than the bare statement of their terms.

Field v. *Mans*, 516 U.S. 59, 69 (1995) (citations omitted). So too, Congress's use of the term "defraud" in the mail fraud, wire fraud, and bank fraud statutes incorporated the common-law elements of fraud, which always have included materiality.

3. At common law in 1872, it was, as it remains today, impossible to "defraud"[15] without a *material* misrepresentation or omission. *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 579 (1996) ("actionable fraud requires a material misrepresentation or omission") (citing RESTATEMENT (SECOND) OF TORTS § 538 (1977); W. KEETON, ET AL., PROSSER & KEETON ON LAW OF TORTS § 108 (5th ed. 1984)). The law has never recognized such a thing as fraud involving only immaterial falsehoods.

Courts have always been reluctant to define "fraud" too precisely, fearing that an exact definition "would be in effect telling to the crafty precisely how to avoid the grasp of the law." *McAleer* v. *Horsey*, 35 Md. 439, 452 (1872). Yet the elements of fraud — and the essence of what "fraud" is — have *always* included materiality. See *ibid.* ("the fraud must be material"). As Justice Story explained, "[i]n the first place, the misrepresentation must be of something material, constituting an inducement or motive to the act or omission

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[15] Although materiality is most commonly discussed as a requirement of "fraud," to "defraud" is simply "[t]o practice fraud." H. BLACK, A DICTIONARY OF LAW 347 (1891); BLACK'S LAW DICTIONARY 423 (6th ed. 1990) (same). See also 1 J. BOUVIER, A LAW DICTIONARY 546 (10th ed. 1860) (single entry for "FRAUD, TO DEFRAUD").

of the other party." 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 195 (10th ed. 1870). See also *id.*, §§ 191-196; 37 AM. JUR. 2D *Fraud and Deceit* § 177, at 236-237 (1964) (collecting cases and stating that "one of the fundamental principles which pervades jurisprudence involving fraud, and the maintenance of actions or defenses based thereon, is that to constitute fraud in any case, the facts misrepresented or concealed must have been material facts").

At common law, "fraud" did not describe a particular action, but was, rather, a concept incorporated into various actions. At the time when Congress first enacted the mail fraud statute, courts had most often discussed "fraud" in the context of actions in tort for deceit, actions in equity to rescind a fraudulently induced contract, and actions in assumpsit for breach of a contract containing a fraudulent warranty.[16] All three actions required proof of materiality. For example, in an 1872 deceit case seeking damages for "false and fraudulent representations," the Maryland high court held that "the fraud must be material to the contract or transaction * * *, for if it relate to another matter or to this only in a trivial or unimportant way, it affords no ground for the action of the Court." *McAleer*, 35 Md. at 452. See also *id.* at 457-458 (actionable misrepresentation concerned "a substantial and most material fact" that "would naturally and unquestionably have great influence in inducing the purchase"). The court further explained that a "sale is voidable" when the buyer is misled by a "representation [that] is false in any one substantial circumstance, going to the inducement or essence of the bargain." *Id.* at 457. Similarly, in an assumpsit case of the same period, the Virginia Supreme Court of Appeals relied on earlier case law recognizing that "there is fraud to support an action of deceit at law, and to be a ground for the rescission of the transaction in equity" when a misrepresentation would "induce a reasonable man to believe

[16] Fraud concepts in criminal law are discussed *infra* at 36-38.

that it * * * is meant to be acted on." *Herron* v. *Dibrell*, 12 S.E. 674, 676 (Va. 1891).[17]

This Court's decisions also squarely demonstrate that there was no doubt in 1872 that "fraud" required a material falsehood. See, *e.g.*, *Slaughter's Administrator* v. *Gerson*, 80 U.S. (13 Wall.) 379, 383 (1872) (avoidance of contract due to "misrepresentation and fraud" required a misrepresentation that "relate[d] to a material matter"); *Smith* v. *Richards*, 38 U.S. (13 Pet.) 26, 39 (1839) (in action "to set aside a contract for fraud," "the misrepresentation must be of something material").

This Court's standard presumption that statutory language bears its normal, common-law meaning thus compels the conclusion, absent strong evidence of a contrary congressional intent, that the term "defraud" in the mail fraud, wire fraud, and bank fraud statutes requires proof of a material misrepresentation or omission.

B. Congress Did Not Intend To Alter The Common-Law Meaning Of "Fraud" In The Mail Fraud, Wire Fraud, And Bank Fraud Statutes.

To be sure, if a statute "otherwise dictate[s]," this Court will not interpret statutory language to carry its common-law meaning. *Wells*, 519 U.S. at 491. See *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 740 (1989) (relying on common-law meaning of terms because "[n]othing in the text * * * indicate[d]" a contrary intent); *Amax Coal*, 453 U.S. at 330 (Court would interpret statute to

[17] Deceit, equitable remedies, and assumpsit were not the only means of redressing fraud. See, *e.g.*, *Snow* v. *Alley*, 11 N.E. 764 (Mass. 1887) (action for trover, which cannot be maintained until after rescission of the underlying contract). See generally P. Dalley, *The Law of Deceit, 1790-1860: Continuity Amidst Change*, 39 AM. J. LEGAL HIST. 405 (1995). Variations of fraud existed in both function and form. In Pennsylvania, for instance, the action was in "trespass for deceit." See, *e.g.*, *Lare* v. *Westmoreland Specialty Co.*, 25 A. 812 (Pa. 1893). As with the other actions for fraud, Pennsylvania law required the statement or omission in question to be material. *Dunbar* v. *Preston*, 132 A. 707, 708 (Pa. 1926).

incorporate settled equitable principles "unless Congress has unequivocally expressed an intent to the contrary"). But *nothing* in the text of the mail fraud, wire fraud, and bank fraud statutes signals a congressional intent to abandon the common-law materiality element. Just the opposite, every indication is that Congress intended the mail fraud statute — and thus the wire fraud and bank fraud statutes — to incorporate the common law requirement of materiality.

1. While the term "fraud" historically has been a term of civil, rather than criminal, law, the fact that the mail fraud, wire fraud, and bank fraud statutes are criminal laws provides no basis for divorcing them from the language Congress chose. The criminal analogs of civil fraud that existed in 1872 were, like civil fraud itself, unyielding in their insistence that immaterial falsehoods were insufficient. A criminal fraud statute that did not require materiality would have been utterly foreign to the law in 1872.[18]

The early crime that most closely resembled civil fraud was "false pretenses." England first criminalized false pretenses with a 1757 statute that outlawed obtaining the property of another by "false pretence * * * with intent to cheat or defraud." 30 Geo. 2, ch. 24,

[18] In arguing that the mail fraud, wire fraud and bank fraud statutes do not incorporate the common law elements of fraud, the government points out in its response to the petition that while plaintiffs must prove "justifiable reliance" on a defendant's misrepresentations or omissions to recover for civil fraud, the government is not required to make such a showing in a mail fraud, wire fraud, or bank fraud prosecution. Brief for the United States at 7 (citing *United States* v. *Coffman*, 94 F.3d 330, 333-334 (7th Cir. 1996)). But the reason that reliance is not an element of these crimes is simply, as Chief Judge Posner explained in *Coffman*, that "[t]he statute punishes the scheme * * * rather than the completed fraud. It punishes, in short, the attempt to defraud." 94 F.3d at 333 (citation omitted). Because a defendant can violate the mail fraud statute merely by hatching a "scheme or artifice to defraud" and mailing a letter, it is irrelevant whether the scheme successfully induced reliance by its intended victims. The "scheme or artifice" still must be one, however, that, if successful, would actually "defraud" in the common-law sense.

§ 1 (1757) (Eng.).[19] From the beginning, cases applying the statute held that it applied only to false statements that would actually influence the victim's action. Indeed, the first such reported case established the necessary relationship between the statement and the transaction: "If the intent be made out, and the false pretence used *in order to effect it*, it brings the case within [the] statute." *Young* v. *The King*, 3 Term Rep. 98, 104 (K.B. 1789) (emphasis added). See also F. WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 451-452 (1846).

When Congress enacted the mail fraud statute, American courts, too, had held without exception that false statements immaterial to a transaction were insufficient to support a conviction for criminal fraud. See WHARTON, *supra*, at 451-463 (collecting cases). In 1872, the same year Congress passed the mail fraud statute, a leading treatise remarked that "these [criminal fraud] statutes are construed in reference to the spirit and reasons of the common law; and they do not therefore extend, as the non-professional reader might suppose, to every imaginable kind of false pretence." 1 J. BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 586, at 354-355 (5th ed. 1872) (collecting cases). Thus, for example, in *Commonwealth* v. *Drew*, 19 Pick. 179, 183 (Mass. 1837), the court held that lying about one's name is not criminal unless the false name would contribute to the victim's decision to advance money. See also, *e.g.*, *Woodbury* v. *State*, 69 Ala. 242, 245-246 (1881) (criminal fraud conviction reversed because, although the defendant gave a false address, it was not a "material fact"); *Commonwealth* v. *Hershell*, Thacher's Cr. Cases 70, 78-79 (Boston Mun. Ct. 1824) (conviction required that the false statement would be a "material inducement"). In this country, as in England, a "false representation, to suffice for

[19] The statute was revised three times, in 1812, 1827, and again in 1861, but none of these modifications touched on the question of materiality, and all retained the requirement of an intent to "defraud." See 52 Geo. 3, ch. 64 (1812) (Eng.); 7 & 8 Geo. 4, ch. 29, § 53 (1827) (Eng.); 24 & 25 Vict., ch. 96, § 88 (1861) (Eng.).

false pretenses, must be as to a material fact." 2 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 8.7(b)(4) (1986).[20]

It would be remarkable, to say the least, if the drafters of the mail fraud statute chose to prohibit a "scheme or artifice to defraud" — using language with a well-established common-law meaning — but actually intended to create an entirely new species of crime without any historical precedent in the common law, and without any such indication in the text of the statute.

2. Nor does the legislative history contain any suggestion that Congress meant to strip the term "defraud" in the mail fraud statute of its settled meaning and to criminalize a category of conduct — immaterial misrepresentations and omissions — for which there had previously never been civil or criminal liability.

The mail fraud statute, first proposed in 1870 as part of a revision of the postal code, was enacted in 1872. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 293, 323. The new law was "intended to prevent the frauds which are mostly gotten up in the large cities of New York and Philadelphia, chiefly in New York, by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country." Cong. Globe, 41st Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth). The

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[20] Other early fraud-related crimes also required materiality. For example, "cheat," the use of altered weights or measures to defraud, was criminal at common law largely because, "according to the necessary customs and order of society, every man must be supposed to place confidence" in such measures. 1 BISHOP, *supra*, § 585, at 354. See also 4 W. BLACKSTONE, COMMENTARIES *157-158 (describing other forms of cheat such as "playing with false dice"). An altered measure is *always* material because it affects the amount of product a buyer receives for his money. Forgery was the "false making or *materially* altering, with intent to defraud, of any writing." 1 BISHOP, *supra*, § 572, at 347 (footnotes omitted, emphasis added). And the crime of perjury required a false statement "in some point material to the question in dispute," and not "in some trifling collateral circumstance, to which no regard is paid." 4 BLACKSTONE, *supra*, at *137. See also *Kungys*, 485 U.S. at 769.

schemes that the statute targeted — characterized as "frauds" — clearly involved material deception. Representative Farnsworth described "circulars and letters sent out * * * from various bogus offices in the large cities, professing to be from agents of some enterprise or other, which are well enough upon their face, but upon examination are found to be entirely bogus." *Ibid.* In many cases, the big-city con-men that Representative Farnsworth referred to would fool their victims by proposing to sell counterfeit money. With their letters, they would

> send a genuine twenty-five or fifty cent currency note. The person receiving the circular may not be particularly ignorant, but being somewhat greedy, he shows it to some banker or broker, who, of course, pronounces it to be good money. Thereupon, the countryman immediately sends to the address of the agent, in New York, for instance, ten, fifteen, or twenty dollars, with an order for so much as it may purchase. A box or package is sent to him, perhaps, which upon being opened is found to contain waste paper, sawdust, or may be bogus money.

Ibid. These schemes plainly involved material misrepresentations: the deceit (representing samples of genuine currency as counterfeit, and falsely promising to send counterfeit currency) went to a matter important to the transaction and obviously had a predictable tendency to affect victims' decisions. Thus, Representative Sargent (who questioned the wording of the statute) described the cited schemes as "the frauds of those nefarious rascals who send out their circulars *to entrap the unwary* into purchasing counterfeit money." *Ibid.* (emphasis added). Nothing about these scams, nor anything else in the legislative history, suggests that in enacting the mail fraud statute Congress sought to create a new species of "fraud" for which materiality was not required.[21]

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[21] There is no reason to think that Congress in 1872 had any intention of redefining the concept of fraud. The mail fraud statute, entitled "Penalty for Misusing the Post-Office Establishment," did not criminalize fraud *per se*, but rather sought to proscribe the use of the post office to effectuate a

In 1889, the statute was amended by "language expressly reaching schemes of the period, many of the same nature as those mentioned by Representative Farnsworth in 1870." *McNally* v. *United States*, 483 U.S. 350, 357 n.6 (1987). See Act of Mar. 2, 1889, ch. 393, § 1, 25 Stat. 873.[22] As this Court has observed, the new language was "nothing more than a reconfirmation of the statute's original purpose in the face of some disagreement among the lower federal courts as to whether the statute should be broadly or narrowly read." *McNally*, 483 U.S. at 357 n.6.

The statute was further revised in 1909, with an amendment adding the words "or for obtaining property by means of false or

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fraudulent scheme. The "gist" of the crime, it was often said, was the mailing. See generally J. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771 (1980). As this Court recognized in *Parr*, Congress left the question of what constitutes a "scheme or artifice to defraud" under the mail fraud statute "for determination under other laws." 363 U.S. at 389. See also W. Gray, Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562, 568 (1980) ("Congress in the fraud legislation of 1872 did not use the term 'fraud' in some new and technical way, but rather intended to prohibit schemes that were within the conventional usage of the term and involved use of the federal mails.").

[22] The new language made explicit the statute's applicability to schemes involving any

> spurious coin, bank note, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the 'sawdust swindle', or 'counterfeit-moneyfraud', or by dealing or pretending to deal in what is commonly called 'green articles', 'green coin', 'green goods', 'bills', 'paper goods', 'spurious Treasury notes', 'United States goods', 'green cigars', or any other names or terms intended to be understood as relating to such counterfeit or spurious articles * * *.

fraudulent pretenses, representations, or promises" after the original phrase "any scheme or artifice to defraud." Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130. Nothing in the legislative history provides any support for the assertion that Congress meant this revision to remove the element of materiality from the offense. The Senate Report simply included in the margin a lengthy citation of what appears to be every reported mail-fraud decision at the time, including *Durland* v. *United States*, 161 U.S. 306 (1896). See S. Doc. No. 68, 57th Cong., 1st Sess., pt. 2, at 63, 64 (1901). On the Senate floor, the only commentary regarding the amendment concerned a change that allowed prosecution when the mailing was made from outside the United States. Otherwise, the legislation's sponsor, Senator Heyburn, commented, "I do not think there is any other change, which is not obvious upon the face of the bill, that needs any further explanation." 42 Cong. Rec. 1026 (1908).

The 1909 revision was the "last substantive amendment of the statute." *McNally*, 483 U.S. at 357 n.6. The outdated list of exemplary schemes was removed in 1948 by an amendment "designed to remove surplusage without changing the meaning of the statute." *Ibid.* Since then, the statute has been subject only to several minor "technical" changes. *Ibid.*[23] In short, legislative history offers no support for the argument that the term "defraud," as used in the mail fraud, wire fraud, and bank fraud statutes, requires anything less than a material misrepresentation or omission.

3. Against this backdrop, it is no surprise that turn-of-the-century courts consistently read the new law in accordance with the traditional understanding that materiality is an element of a "scheme or artifice to defraud." For example, with language strikingly similar

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[23] There has been one additional substantive amendment since *McNally*. After *McNally* held that the mail fraud statute was "limited in scope to the protection of property rights," 483 U.S. at 360, Congress enacted 18 U.S.C. § 1346, which specifies that the statute applies to "a scheme or artifice to deprive another of the intangible right of honest services." Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4508 (1988). This amendment has no bearing on the questions presented.

to the "natural tendency" test articulated by this Court in *Kungys*, 485 U.S. at 770, one of the earliest reported decisions interpreting the mail fraud statute explained that "a scheme to defraud within the meaning of" the mail fraud statute was "[a]ny scheme, *the necessary result of which would be the defrauding of somebody*." *United States* v. *Jones*, 10 F. 469, 470 (C.C.S.D.N.Y. 1882) (emphasis added). See also *United States* v. *Owens*, 17 F. 72, 74 (E.D. Mo. 1883) ("the act was designed to strike at *common schemes of fraud*, whereby, through the post office, circulars, etc., are distributed, *generally to entrap and defraud the unwary*") (emphasis added).

This Court did not address the significance of the statutory term "scheme or artifice to defraud" until 1896. That year, in *Durland*, 161 U.S. at 312, the Court considered a defendant's argument "that the statute reache[d] only such cases as, at common law, would come within the definition of 'false pretenses,' in order to make out which there must be a misrepresentation as to some existing fact, and not a mere promise as to the future." Rejecting this argument, the Court explained that the mail fraud statute did not require a misrepresentation of a past or existing fact, but rather applied to "any scheme or artifice to defraud." *Id.* at 313.

To illuminate the meaning of the statute, the *Durland* Court did not find it necessary to look beyond traditional notions of fraud. First, the Court noted that "[s]ome schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud. Punishment because of the fraudulent purpose is *no new thing*." *Ibid.* (emphasis added). The Court then quoted its opinion in *Evans* v. *United States*, 153 U.S. 584, 592 (1894), for the proposition that if a person buys goods on credit, "knowing that he will not be able to pay for them, and with an intent to cheat the vendor, *this is a plain fraud, and made punishable as such by statutes in many of the States*." 161 U.S. at 313 (emphasis added). In determining what was meant by "scheme or artifice to defraud," the *Durland* Court never suggested that "fraud" for purposes of the mail fraud statute was a new or more expansive

creature than "plain fraud." Instead, the Court invoked traditional fraud principles and state law to construe the statute's reach.[24]

Durland also suggests that a representation's predictable tendency to influence the decision-making of its audience, *i.e.*, materiality, was central to the Court's conception of fraud:

> *It is common knowledge that nothing is more alluring* than the expectation of receiving large returns on small investments. Eagerness to take the chances of large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than is parted with *appeals to the cupidity of all*. In the light of this the statute must be read * * *.

Ibid. (emphasis added). In holding that the mail fraud statute is not co-extensive with the crime of false pretenses, the *Durland* Court reinforced the presumption that the mail fraud statute reaches no further than the elements of common-law fraud, and thus incorporates the common-law element of materiality.

In the mail fraud statute's early years, materiality was a central concern. For this reason, courts carefully distinguished mere "puffing" from "false representations of material facts which are in their nature calculated to deceive." *Harris* v. *Rosenberger*, 145 F.

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[24] The *Durland* Court was correct that the traditional conception of "fraud" was sufficiently broad to encompass promises regarding the future. "[A]n American decision as early as 1839 [held] that deceit would lie for a false promise, and a considerable number of decisions that false promises were sufficient fraud for purposes of rescission were handed down in the decade preceding the *Durland* case." A. Pearce, *Theft by False Promises*, 101 U. PA. L. REV. 967, 978 n.51 (1953) (citation omitted). See also, *e.g.*, F. MONCREIFF, A TREATISE ON THE LAW RELATING TO FRAUD AND MISREPRESENTATION 98 (1891) (a "representation as to intention, reason, motive, opinion, or law may * * * be a representation of a matter of fact, and the ground of an action"); M. BIGELOW, A TREATISE ON THE LAW OF FRAUD ON ITS CIVIL SIDE 476 (1888) (a statement concerning the future "if precise and definite, may imply a present fact, and mislead accordingly").

449, 455 (8th Cir. 1906). For instance, in *Faulkner* v. *United States*, 157 F. 840 (5th Cir. 1907), the Fifth Circuit reversed a conviction where the defendant had been found guilty of mail fraud after obtaining money by advertising his purportedly vast cold-storage facility. The court noted that there "was conflict in the evidence as to the size of the place, *but that seems to us immaterial*. The fact is he was simply advertising his business, and, if the advertisement contains some exaggerations, that does not constitute a scheme to defraud." *Id.* at 841 (emphasis added).

The materiality standard also was expressed as a requirement that misrepresentations not only be "designed" to defraud, but also "reasonably adapted" for the purpose — an inquiry that naturally turned on their capacity to achieve the desired end. See *Brooks* v. *United States*, 146 F. 223, 227 (8th Cir. 1906) (the mail fraud statute "contemplates any scheme * * * provided only it was designed and reasonably adapted to deceive and defraud"); *Lemon* v. *United States*, 164 F. 953, 957 (8th Cir. 1908) (upholding indictment because, among other things, it alleged a scheme or artifice "well designed and adapted to deceive").

Finally, the materiality requirement was evident in early mail fraud jury instructions. In *Flachskamm* v. *United States*, 127 F. 674 (7th Cir. 1904), the defendants had placed an advertisement offering a "fur collarette" and certain other objects to persons who sold two dollars' worth of jewelry for them. The collarettes were never delivered, and the other objects did not live up to their billing. The trial judge instructed the jury to consider the natural, predictable effect of the defendants' representations: "The reasonable construction which the ordinary reader into whose hands the advertisement might fall would put upon that advertisement gentlemen, in my mind, is the basis which must control your verdict in this case." *Id.* at 676. The jury was further told to consider whether there was a material difference between what was promised and what was delivered:

> [If you determine that] the articles given in return for the remittances of Two Dollars * * * were different in description and quality from the articles named in the advertisement and that such *difference in description and quality from the articles named [was] so great as to amount to fraud*, then you will find the defendants guilty. * * * [Y]ou will not find the defendants guilty unless you find that the articles given in exchange for the Two Dollar remittance were *so different and so inferior both in quality and description as to amount to fraud*.

Ibid. (emphasis added).[25]

In short, during the critical period when the mail fraud statute was adopted and revised, the statute was understood by this Court and by the lower courts charged with applying it to include the established element of materiality. There is simply no evidence that Congress intended anything else.

4. The presumption that Congress intended the term "defraud" to include the common-law requirement of materiality also is strengthened by the fact that other language in the mail fraud, wire fraud, and bank fraud statutes independently confirms that materiality is an element of these crimes.

For example, the statutes prohibit a "scheme or artifice" to commit fraud. It has never been doubted that similar language in the securities laws requires proof of materiality. For example, this Court has always understood § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), which prohibits a "manipulative or

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[25] Other jury instructions explained that a scheme must include representations possessing a natural tendency to entrap the unwary.

> A commonplace definition * * * likens an artifice to a dawjack, or artificial bait, *which lures an unsuspecting fish to bite* at the gaily colored wooden minnow covered with fish hooks, disguised by their color so that the fish is caught; hence it would seem that *any scheme, artifice, or plan, the necessary result of which would be the defrauding of somebody, would be a scheme and artifice to defraud*.

M. TAYLOR, THE LAW OF POSTAL FRAUDS & CRIMES 182-183 (1931) (emphasis added). The instruction's final clause is identical to the language used in 1882 by the court in *Jones*, 10 F. at 470.

deceptive device or contrivance," but does not use the word "material," to contain a materiality element. See *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 232 (1988) (adopting materiality standard for § 10(b)); *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 474-476 (1977) (complaint did not allege violation of § 10(b) when it "failed to allege a material misrepresentation or material failure to disclose"). See also generally 7 L. LOSS & J. SELIGMAN, SECURITIES REGULATION 3421-3431, 3437 (3d ed. 1991). Just as telling, in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 152-153 (1972), this Court addressed two provisions of Rule 10b-5, 17 C.F.R. § 210.10b-5, neither of which use the word "material" but which do prohibit a "device, scheme, or artifice to defraud" and a "course of business which operates * * * as a fraud or deceit." The Court held that these provisions were violated "because the defendants devised a plan and induced [the victims] to dispose of their shares without disclosing to them *material* facts." 406 U.S. at 153 (emphasis added). As the Court explained, "[a]ll that is necessary" to make out a violation of these provisions "is that the facts withheld be material." *Ibid.* This Court's securities decisions thus would make no sense if the phrase "scheme or artifice to defraud," as used in the mail, wire and bank fraud statutes, did not likewise require proof of materiality.

The language added to the mail fraud statute in 1909 also shows that Congress understood materiality to be an element of the crime. The 1909 amendment, which codified this Court's holding in *Durland*, added references to "pretenses" and "representations." As discussed *supra* at 36-38, the crime of false pretenses always has included a materiality element. This Court also has explained that the word "misrepresentation" is "commonly associated" with a materiality requirement, and implies a materiality element "in many contexts," including at common law. *Kungys*, 485 U.S. at 781. See also *Fedorenko* v. *United States*, 449 U.S. 490, 507 (1981) (agreeing with the government that statute prohibiting certain "misrepresentation[s]" "only applies to willful misrepresentations about 'material' facts").

It is simply not plausible to suppose that Congress used language so strongly implying materiality while actually intending, in the teeth

of the common-law meaning of the word "defraud," that the mail fraud, wire fraud, and bank fraud statutes should be extended to cover schemes involving immaterial falsehoods.

5. In this case, the court of appeals rested its conclusion that materiality is not an element of the mail fraud, wire fraud, and bank fraud statutes on a misunderstanding of this Court's decision in *Wells*, which held that materiality is not an element of 18 U.S.C. § 1014. Indeed, nothing in *Wells* even remotely suggests that Congress intended the term "defraud" in the mail, wire and bank fraud statutes to carry anything less than its common-law meaning.

The court of appeals believed that these statutes are similar to § 1014 in that they "do not contain the word 'material.'" Pet. App. 7a, 9a. But as explained above, the mail, wire and bank fraud statutes actually are *unlike* § 1014 — which merely prohibits certain "false statement[s]" — in that their language *does* carry a common-law meaning that incorporates materiality. See, *e.g.*, *Field*, 516 U.S. at 69 (Congress's use of "common-law terms * * * impl[ies] elements that the common law has defined them to include").

The court of appeals also stressed that the current version of the mail fraud statute, on which the wire fraud and bank fraud statutes were based, is like § 1014 in that it "was enacted as part of the recodification of the federal criminal code in 1948." Pet. App. 7a. But this Court's decision in *Wells* does not stand for the general rule that any statute enacted as part of the 1948 recodification does not contain a materiality element. *Wells* relied on the fact that in 1948 Congress enacted § 1014 as a conglomeration of 13 earlier statutes, of which "10 had previously contained no express materiality provision and received none in the recodification, while 3 of the 13 had contained express materiality requirements and lost them in the course of consolidation." 519 U.S. at 492-493. The mail fraud statute, on the other hand, has always prohibited a "scheme or artifice to defraud." In 1948, the section was simply renumbered, "surplusage was eliminated[,] * * * and the section [was] simplified without change of meaning." 18 U.S.C. § 1341 Historical and Revision Notes. See also *McNally*, 483 U.S. at 357 n.6.

Finally, the Eleventh Circuit emphasized that Congress "has employed the terms 'material representation' and 'material misrepresentation' in other statutes." Pet. App. 9a. The court concluded from this that Congress does not "intend[] to make materiality an element under a statute whenever it employs the term 'representation' in that statute." *Ibid.* It is not the term "representation," however, that is dispositive of the question presented. Instead, it is Congress's use of the word "defraud" that obviated the need to use the word "material" in the mail fraud, wire fraud and bank fraud statutes because materiality already was an element of common-law fraud. There is no such thing as an "immaterial" fraud. If the court of appeals' analysis were accepted, *no* "fraud" statute would ever have a materiality requirement unless Congress explicitly used the word "material" in the statute. That is not, and cannot be, the law.

C. Due Process And The Rule Of Lenity Also Require That The Mail Fraud, Wire Fraud, And Bank Fraud Statutes Be Read To Include A Materiality Element.

Even if there were any ambiguity as to the meaning of the mail fraud, wire fraud and bank fraud statutes (which there is not), principles of due process and fair warning and also the rule of lenity independently require that the statutes be read to include a materiality element.

1. This Court has "often emphasized the need for clarity in the definition of criminal statutes, to provide 'fair warning * * * in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *Hubbard* v. *United States*, 514 U.S. 695, 701 n.4 (1995) (quoting *McBoyle* v. *United States*, 283 U.S. 25, 26 (1931) (Holmes, J.)). See also, *e.g.*, *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939) ("All are entitled to be informed as to what the State commands or forbids"). A person of ordinary intelligence certainly would conclude from the language of the mail fraud, wire fraud, and bank fraud statutes that they only criminalize "fraud," which, as explained above, has always required proof of materiality. No one would think that he or she could be jailed for 30 years and fined $1,000,000, as all three statutes provide, for a

scheme to "defraud" through immaterial misrepresentations or omissions. In *Williams* v. *United States*, 458 U.S. 279, 286 (1982), for instance, this Court refused to read § 1014's prohibition on "false statement[s]" as covering bad checks because "'false statement' is not a term that, in common usage, is often applied to characterize 'bad checks.'" The same reasoning counsels against any reading of the mail fraud, wire fraud, and bank fraud statutes that would dispense with the element of materiality.

"Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal." *Buckley* v. *Valeo*, 424 U.S. 1, 77 (1976). Any reading of the mail fraud, wire fraud, and bank fraud statutes that omits materiality would raise serious constitutional doubts, and must therefore be rejected for this reason as well. *E.g.*, *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

2. The rule of lenity also leads to the same conclusion. It is "the familiar rule that, 'where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.'" *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 285 (1978) (quoting *United States* v. *Bass*, 404 U.S. 336, 348 (1971)). As this Court explained in *McNally*, "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." 483 U.S. at 359-360. If the use of the word "defraud" — to say nothing of the terms "scheme or artifice," "representation," and "pretenses" — in the mail fraud, wire fraud, and bank fraud statutes does not conclusively establish that materiality is an element of these crimes, the statutes are at least ambiguous in this respect. Because "text, structure, and history fail to establish that the Government's position is unambiguously correct," the rule of lenity requires "resolv[ing] the ambiguity in [petitioner's] favor." *United States* v. *Granderson*, 511 U.S. 39, 54 (1994). See also, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 148 (1994); *Crandon* v. *United States*, 494 U.S. 152, 158

(1990); *Liparota* v. *United States*, 471 U.S. 419, 427 (1985); *Rewis* v. *United States*, 401 U.S. 808, 812 (1971).

* * * *

For all of the foregoing reasons, it is clear that materiality is an essential element of the federal mail fraud, wire fraud and bank fraud statutes, 18 U.S.C. §§ 1341, 1343, 1344. Accordingly, the district court reversibly erred by removing materiality from the jury's consideration of the mail, wire and bank fraud counts of the indictment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1998

Supreme Court, U.S.
FILED
JAN 4 1999
OFFICE OF THE CLERK

(6) -

No. 97-1985

In the Supreme Court of the United States

OCTOBER TERM, 1998

ELLIS E. NEDER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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57pp

QUESTIONS PRESENTED

1. Whether the trial court's failure to instruct the jury on the materiality element in this case was harmless error because materiality was not in dispute at trial.

2. Whether materiality is an element of the crimes set forth in the federal mail fraud (18 U.S.C. Section 1341), wire fraud (18 U.S.C. Section 1343) and bank fraud (18 U.S.C. Section 1344) statutes.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutory provisions involved	1
Statement	1
Summary of argument	6
Argument:	
I. The trial court's failure to instruct the jury on the materiality element of the tax offense was harmless error	10
A. An instructional omission or misdescription of an element of an offense is not per se harmful error	10
B. The failure to instruct the jury on the materiality requirement of the tax offense was harmless because materiality was undisputed and supported by incontrovertible evidence	18
C. Harmless-error review of undisputed and incontrovertible omitted elements does not exceed the proper role of an appellate court	24
II. Materiality is not an element of the federal mail fraud, bank fraud, and wire fraud statutes	33
A. The mail fraud, wire fraud, and bank fraud statutes have no textual requirement of materiality	33
B. The mail fraud, wire fraud, and bank fraud statutes do not incorporate all of the elements of a common-law cause of action	36

Table of Contents—Continued: Page

C. There is no persuasive policy justification for imputing a materiality requirement to the mail fraud, wire fraud, and bank fraud statutes 43
Conclusion 50

TABLE OF AUTHORITIES

Cases:

Affiliated Ute Citizens v. *United States*, 406 U.S. 128 (1972) 48
Arizona v. *Fulminante*, 499 U.S. 279 (1991) 12, 13
BMW of N. Am., Inc. v. *Gore*, 517 U.S. 559 (1996) 36
Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988) 11
Basic, Inc. v. *Levinson*, 485 U.S. 224 (1988) 48
Bollenbach v. *United States*, 326 U.S. 607 (1946) 16, 17-18
Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 13, 15
Brooks v. *United States*, 146 F. 223 (8th Cir. 1906) 42
Brown v. *United States*, 411 U.S. 223 (1973) 27
Bruton v. *United States*, 391 U.S. 123 (1968) 27
Cabana v. *Bullock*, 474 U.S. 376 (1986) 16, 17
California v. *Roy*, 519 U.S. 2 (1996) 7, 15, 16
Carella v. *California*, 491 U.S. 263 (1989) 14
Carpenter v. *United States*, 484 U.S. 19 (1987) 34
Chapman v. *California*, 386 U.S. 18 (1967) 7, 8, 11, 17, 18
Coy v. *Iowa*, 487 U.S. 1012 (1988) 27
Chisolm v. *TranSouth Fin. Corp.*, 95 F.3d 331 (4th Cir. 1996) 48-49
Crane v. *Kentucky*, 476 U.S. 683 (1986) 8, 27
Delaware v. *Van Arsdall*, 475 U.S. 673 (1986) 8, 13, 19, 21, 22, 24, 27

Cases—Continued: Page

Duncan v. *Louisiana*, 391 U.S. 145 (1968) 21
Durland v. *United States*, 161 U.S. 306 (1896) 9, 37, 38, 40, 42, 44, 49
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 13, 22
Hammerschmidt v. *United States*, 265 U.S. 182 (1924) 38
Harrington v. *California*, 395 U.S. 250 (1969) 27, 28
Harris v. *Rosenberger*, 145 F. 449 (8th Cir.), cert. denied, 203 U.S. 591 (1906) 42, 46
Johnson v. *United States*, 520 U.S. 461 (1997) 11, 12, 13, 16, 20, 28-29, 30
Kay v. *United States*, 303 U.S. 1 (1938) 45
Kotteakos v. *United States*, 328 U.S. 750 (1946) 12, 15
Kungys v. *United States*, 485 U.S. 759 (1988) 44-45
Liparota v. *United States*, 471 U.S. 419 (1985) 33
McCarthy v. *United States*, 187 F. 117 (2d Cir. 1911) 43
McKaskle v. *Wiggins*, 465 U.S. 168 (1984) 13
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986) 33
McNally v. *United States*, 483 U.S. 350 (1987) 35, 38
Milton v. *Wainwright*, 407 U.S. 371 (1972) 27, 29
Nationwide Mut. Ins. Co. v. *Darden*, 503 U.S. 318 (1992) 37
O'Hara v. *United States*, 129 F. 551 (6th Cir. 1904) 47
Pereira v. *United States*, 347 U.S. 1 (1954) 36, 42, 49
Pope v. *Illinois*, 481 U.S. 497 (1987) 8, 15, 16-17, 29, 30, 31, 32
Rose v. *Clark*, 478 U.S. 570 (1986) ..... *passim*
Sandstrom v. *Montana*, 442 U.S. 510 (1979) 14
Satterwhite v. *Texas*, 486 U.S. 249 (1988) 13, 22
Schneble v. *Florida*, 405 U.S. 427 (1972) 27
Smith v. *Richards*, 38 U.S. (13 Pet.) 26 (1839) 36, 39
Staples v. *United States*, 511 U.S. 600 (1994) 33

Cases—Continued: Page

Stokes v. *United States*, 157 U.S. 187 (1895) 35, 49
Strickland v. *Washington*, 466 U.S. 668 (1984) 22, 28, 42
Sullivan v. *Louisiana*, 508 U.S. 275 (1993) ..... *passim*
TSC Indus. v. *Northway, Inc.*, 426 U.S. 438 (1976) 48
Tumey v. *Ohio*, 273 U.S. 510 (1927) 13
United Bhd. of Carpenters & Joiners v. *United States*, 330 U.S. 395 (1947) 16, 17
United States v. *Bagley*, 473 U.S. 667 (1985) 8, 28
United States v. *Brien*, 617 F.2d 299 (1st Cir.), cert. denied, 446 U.S. 919 (1980) 47
United States v. *Brown*, 79 F.3d 1550 (11th Cir. 1996) 47
United States v. *Fay*, 83 F. 839 (E.D. Mo. 1897) 42
United States v. *Gaudin*, 515 U.S. 506 (1995) 6, 10, 11, 19, 32, 40, 45
United States v. *Gay*, 967 F.2d 322 (9th Cir.), cert. denied, 506 U.S. 929 (1992) 46
United States v. *Griffith*, 17 F.3d 865 (6th Cir.), cert. denied, 513 U.S. 850 (1994) 39
United States v. *Groves*, 122 F.2d 87 (2d Cir.), cert. denied, 314 U.S. 670 (1941) 38
United States v. *Hasting*, 461 U.S. 499 (1983) 11, 26
United States v. *Holland*, 880 F.2d 1091 (9th Cir. 1989) 19
United States v. *Hsu*, 155 F.3d 189 (3d Cir. 1998) 41
United States v. *Klausner*, 80 F.3d 55 (2d Cir. 1996) 10
United States v. *Lane*, 474 U.S. 438 (1986) 11
United States v. *Loring*, 91 F. 881 (N.D. Ill. 1884) 38
United States v. *Maxwell*, 920 F.2d 1028 (D.C. Cir. 1990) 47
United States v. *McKay*, 45 F. Supp. 1007 (E.D. Mich. 1942) 39

Cases—Continued: Page

United States v. *Mechanik*, 475 U.S. 66 (1986) 12
United States v. *New South Farm & Home Co.*, 241 U.S. 64 (1916) 46
United States v. *Olano*, 507 U.S. 725 (1993) 11, 12
United States v. *Rabinowitz*, 327 F.2d 62 (6th Cir. 1964) 46
United States v. *Rowe*, 56 F.2d 747 (2d Cir.), cert. denied, 286 U.S. 554 (1932) 39
United States v. *Shabani*, 513 U.S. 10 (1994) 35
United States v. *Stewart*, 872 F.2d 957 (10th Cir. 1989) 38, 39
United States v. *Uchimura*, 125 F.3d 1282 (1997), cert. denied, 119 S. Ct. 151 (1998) 20
United States v. *Wells*, 519 U.S. 482 (1997) 5, 9, 33-34, 36-37, 44
United States v. *Young*, 232 U.S. 155 (1914) 36, 42, 49
Vasquez v. *Hillery*, 474 U.S. 254 (1986) 13
Waller v. *Georgia*, 467 U.S. 39 (1984) 13
Woodbury v. *State*, 69 Ala. 242 (1881) 36
Yates v. *Evatt*, 500 U.S. 391 (1991) 6, 8, 14, 26, 30

Constitution, statutes, regulation and rule:

U.S. Const.:
Amend. I 15, 29
Amend. V 9, 28
Amend. VI 22, 27, 28
Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323 34
Act of March 2, 1889, ch. 393, § 1, 25 Stat. 873 35
Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130 35
Racketeer Influenced and Corrupt Organizations Act,
18 U.S.C. 1961 *et seq.* 48
18 U.S.C. 1962(c) 2
18 U.S.C . 1962(d) 2
18 U.S.C. 1964(c) 48
11 U.S.C. 523(a)(2)(A) 48
18 U.S.C. 371 2
18 U.S.C. 1014 ..... 2, 34

Statutes, regulation and rule—Continued:	Page
18 U.S.C. 1341	2, 34, 37, 40, 43
18 U.S.C. 1343	2, 34, 40, 43
18 U.S.C. 1344	2, 34, 40, 43-44
18 U.S.C. 1346	39
21 U.S.C. 843(a)(4)(A)	34
26 U.S.C. 6700(a)(2)(A)	34
26 U.S.C. 7206(1)	2, 10, 19, 20
28 U.S.C. 2111	10-11
17 C.F.R.:	
Pt. 240.10:	
Section 240.10b-5(a)	48
Section 240.10b-5(b)	48
Fed. R. Crim. P. 52	11, 12
(a)	10, 11
(b)	11

Miscellaneous:

2 J. Bishop, *Commentaries on the Criminal Law* (5th ed. 1872)	39-40, 47
2 J. Bishop, *Criminal Law* (9th ed. 1923)	46
140 Cong. Rec. H10,773 (daily ed. Oct. 4, 1994)	44
2 E. Devitt et al., *Federal Jury Practice and Instructions: Criminal* (4th ed. 1990)	16
J. Greabe, *Spelling Guilt Out of a Record? Harmless-Error Review of Conclusive Mandatory Presumptions and Elemental Misdescriptions*, 74 B.U. L. Rev. 819 (1994)	23-24
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Model Penal Code (1985)	41, 45
S. Rep. No. 225, 98th Cong., 1st Sess. (1983)	34
Restatement (Second) of Torts (1977)	39
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1 J. Story, *Commentaries on Equity Jurisprudence* (13th ed. 1886)	36, 39, 40
M. Taylor, *The Law of Postal Frauds & Crimes* (1931)	38-39, 47
R. Traynor, *The Riddle of Harmless Error* (1970)	20

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 97-1985

ELLIS E. NEDER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 136 F.3d 1459.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1998. The petition for a writ of certiorari was filed on June 9, 1998, and was granted on October 13, 1998 (119 S. Ct. 334). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1341, 1343, and 1344 of Title 18 and Section 7206(1) of Title 26 are reproduced at Pet. App. 43a-47a.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of

one count of conducting the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. 1962(c)); one count of conspiring to commit that offense (18 U.S.C. 1962(d)); one count of conspiring to defraud a financial institution (18 U.S.C. 371); 12 counts of bank fraud (18 U.S.C. 1344); nine counts of mail fraud (18 U.S.C. 1341); nine counts of wire fraud (18 U.S.C. 1343); 37 counts of making false statements to a financial institution (18 U.S.C. 1014); and two counts of filing false income tax returns (26 U.S.C. 7206(1)). He was sentenced to 147 months' imprisonment, to be followed by five years' supervised release, and was ordered to pay approximately $25 million in restitution. Pet. App. 14a-20a. The court of appeals affirmed. Pet. App. 1a-13a.

1. *Land Acquisition Fraud.* Between 1984 and 1986, petitioner purchased land using shell corporations. Petitioner then immediately resold the land at much higher prices to limited partnerships that he controlled. *E.g.*, Tr. 9:27-31. Petitioner used bank loans to finance the resales. Because the loans typically amounted to 70-75% of the inflated price, the loan proceeds substantially exceeded the original cost of the land to petitioner's shell corporations. *Id.* at 84-85.

Petitioner made numerous false statements, including statements in affidavits, to conceal from lenders that he controlled the shell corporations that had first purchased the land at prices substantially lower than the inflated resale price being financed by the lenders. *E.g.*, Tr. 4:120-128. Petitioner also misrepresented to lenders that his partnerships had made significant down payments to the corporations selling the land, and he falsely denied that he was sharing in the profits of the seller corporations. *E.g.*, Tr. 1:170-171; 4:166. The lenders testified that petitioner's false statements were material to their decisions to make the loans in question. *E.g.*, Tr. 1:170-171, 186-188.

After the transactions, petitioner deposited to his personal account a check reflecting the amount by which the

loan proceeds exceeded the original purchase price of the land. *E.g.*, Tr. 2:54. In this way, petitioner obtained more than $7 million. Pet. App. 2a. Petitioner subsequently defaulted on the loans. *Ibid.*

Land Development Fraud. In 1985, petitioner obtained a $4,150,000 construction loan from Amerifirst Savings & Loan ("Amerifirst") to build condominiums on a project known as Cedar Creek. Tr. 6:77-78. To qualify for the loan, petitioner was required to make advance sales of 20 condominium units, in order to establish the marketability of the project. *Id.* at 80-83, 87. Petitioner was initially unable to meet this requirement, so he secured seven additional buyers by making their required down payments in amounts ranging from $4,000 to $8,900. Tr. 6:100-114, 176-177, 192-200, 210; 8:5-12. Petitioner also arranged to have the down payments transferred back to him from the escrow account into which they had been placed. Tr. 6:128, 161. Petitioner later defaulted on the construction loan, without repaying any of the principal. Tr. 6:116-122; 15:38-39, 43-44. Amerifirst would not have made the loan had it been aware that petitioner rather than the buyers had made the down payments on seven of the sales. Tr. 6:154-159.

Using a similar scheme, petitioner obtained a $5,400,000 loan, and unsuccessfully attempted to obtain an additional loan, from Security First Savings and Loan for development of condominiums at another project known as Southern Grove. Tr. 7:5-188; 9:118-119; 10:52-54.

Attempted Fraud on Central Bank. In 1988, petitioner attempted to obtain funds fraudulently in the course of seeking a $4,700,000 land development loan from Central Bank for a project known as the View. Petitioner had previously obtained from another lender an $847,500 land acquisition loan for the View, which was the only existing valid mortgage on the property. Tr. 9:211-212. Petitioner, however, subsequently directed his attorney to execute a false promissory note and mortgage deed on the property in

the amount of $280,000, thus bringing the apparent mortgage debt on the property to approximately $1,100,000. Tr. 9:198-204; 10:10-15 32:91-92. Unaware of the fraud, Central Bank agreed that it would advance $1,130,000 at closing to pay off the existing debt on the land. Tr. 9:198-204, 211-223. The loan fell through, however, because petitioner's lawyer refused to sign an opinion letter representing that petitioner's financial status had not changed for the worse. Tr. 9:226-227; 32:93-95.

Construction Loan Fraud. In November 1986, petitioner obtained a $6 million land acquisition loan from the United Brotherhood of Carpenters and Joiners of America ("the Union"), for a project known as Reddie Point. Tr. 10:54-56, 73. After falling behind on his payments, petitioner negotiated a consolidated $14 million loan from the Union to cover land acquisition costs and construction costs. *Id.* at 10:55-56, 70. Under this loan, petitioner could submit draw requests for work actually performed on construction at Reddie Point. Tr. 10:95-104; 11:105. Between September 1987 and March 1988, petitioner submitted numerous draw requests based on false invoices. Tr. 11:111-186; 12:3-91. The Union approved payment of the draw requests, and petitioner obtained almost $3 million unrelated to any work performed at Reddie Point. Tr. 11:13-64; 13:57-58.

Tax Offenses. Petitioner failed to report on his personal income-tax return more than $1 million in income for 1985 and more than $4 million in income for 1986. Pet. App. 2a. Those amounts represented profits from petitioner's land acquisition scheme, which petitioner had deposited in his own personal account and used for his own purposes. *E.g.*, Tr. 19:124-142; 25:122-123, 200; 26:29.

2. At trial, petitioner defended against the bank fraud, mail fraud, and wire fraud charges arising out of the land and construction loan schemes by contesting the falsity of his statements to the lenders, and by contending that he relied in good faith on the advice of his attorney and lacked an

intent to defraud lenders. See, *e.g.*, J.A. 149-155, 161-162 (opening statement); J.A. 169-173, 180-183, 188-190, 210, 218-225, 229-230, 233-236 (closing argument). Petitioner also argued that some lenders knew how he structured the transactions and used his loan draws, and knew of the falsity of certain statements and did not actually rely on them. See, *e.g.*, J.A. 178-179, 184-190, 194-195, 229 (closing argument).

Petitioner defended against the tax charges by contending that the proceeds from the land acquisition loans were not income because he intended to repay the loans, and that he had relied in good faith on the advice of his accountant and his lawyer that he need not report the proceeds as income. Pet. App. 12a-13a; J.A. 208-211, 235 (closing argument). Petitioner's attorney concluded his opening statement by emphasizing that "there's only one issue in this case * * * [a]nd that issue is did [petitioner] or anybody else have the criminal intent to defraud." J.A. 161-162.

The district court instructed the jury on the bank fraud, false statement, and tax offenses that the question of materiality was not for the jury to decide. J.A. 249, 252-253, 256. In instructing the jury on the mail fraud and wire fraud offenses, the district court did not include materiality as an element. J.A. 253-255. Petitioner objected to the district court's refusal to submit the question of materiality to the jury. J.A. 165-166. The district court subsequently found, outside the presence of the jury, that the evidence established materiality beyond a reasonable doubt on all counts at issue. J.A. 167. Petitioner did not contest that finding. *Ibid.*

3. On appeal, petitioner contended that the district court committed reversible error by refusing to submit the question of materiality to the jury. The court of appeals rejected that contention. Pet. App. 3a-13a.

In rejecting petitioner's challenge to his false statement convictions under 18 U.S.C. 1014, the court of appeals relied on *United States* v. *Wells*, 519 U.S. 482 (1997), which held that materiality is not an element of that offense. Pet. App.

3a-5a. The court further held that, under the analysis in *Wells*, materiality is not an element of mail fraud (18 U.S.C. 1341), wire fraud (18 U.S.C. 1343), or bank fraud (18 U.S.C. 1344). Pet. App. 6a-10a.

With respect to petitioner's tax offenses, the court of appeals held that materiality is an element of the offense of falsely subscribing to a tax return in violation of 26 U.S.C. 7206(1), and that under *United States* v. *Gaudin*, 515 U.S. 506 (1995), the district court erred in failing to submit the issue of materiality to the jury. Pet. App. 10a-11a. The court concluded, however, that the error was harmless, because "materiality was not in dispute regarding [petitioner's] tax fraud offense." *Id.* at 12a. The court explained that, under Section 7206, "a 'material matter' is any information necessary to a determination of a taxpayer's income tax liability." *Ibid.* The court further explained that "[a]n accurate reflection of income is critical to determining a taxpayer's income tax liability," and pointed out that petitioner's tax convictions "were based on his failure to report $1,372,360 in income in 1985 and $4,355,766 in income in 1986." *Ibid.* Finally, the court noted that "[petitioner] did not contest the materiality of his failing to report this income either through testimony or evidence presented during the trial, or during closing argument." *Ibid.* The court therefore concluded that the error "did not contribute to the verdict obtained." *Id.* at 13a (quoting *Yates* v. *Evatt*, 500 U.S. 391, 403 (1991)).

SUMMARY OF ARGUMENT

I. A trial court's failure to submit an element of a criminal offense to the jury is constitutional error. But, like most constitutional error, it is subject to harmless-error analysis. Such an error should be found harmless when an appellate court can determine that the defendant did not dispute the element at trial, and, in light of the proof, the element was

indisputable. That is the case here with respect to the omitted materiality element in petitioner's tax offenses.

This Court's cases establish a strong presumption that constitutional errors are subject to harmless-error inquiry. The Court has recognized a limited number of fundamental errors (sometimes called "structural errors") that are intrinsically harmful in all cases, such as the total deprivation of counsel or the presence of a biased judge. A defective reasonable-doubt instruction that vitiates all of the jury's findings falls within that class. *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). But instructional errors that affect only a single element do not. Such errors do not represent a basic breakdown in the trial mechanism or other pervasive error that requires reversal in all cases. Rather, such errors have been repeatedly held to be reviewable in accordance with harmless-error principles. See, *e.g.*, *Rose* v. *Clark*, 478 U.S. 570 (1986); *California* v. *Roy*, 519 U.S. 2 (1996) (per curiam).

A proper application of harmless-error principles leads to the conclusion that, when an issue is not controverted or controvertible, the jury's erroneous failure to determine it does not "contribute to the verdict obtained." *Chapman* v. *California*, 386 U.S. 18, 24 (1967). That is so for three reasons. First, the defendant in such a case had a full and fair opportunity to have the jury determine the crucial question of his guilt or innocence on all issues on which he raised (or could have raised) a defense. The verdict of guilty is therefore entitled to respect, because there is no reason to believe that the jury reached an unjust or inaccurate result. Second, the doctrine of harmless error protects public respect for the criminal process, which would suffer if convictions were reversed based on instructional errors that related only to undisputed and incontrovertible matters. Third, and relatedly, the consequence of reversal would not be to afford the defendant the chance to dispute the omitted element before the jury. Here, for example, petitioner surely would not contend that an understatement of millions

of dollars in taxable income is immaterial. Rather, a new trial would simply afford the defendant the chance to try for acquittal with a new jury on the same issues that he previously litigated and lost. Nothing in the Constitution requires society to bear the significant costs of a retrial simply to provide the defendant with that second bite at the apple.

Some of this Court's pre-*Chapman* cases suggest that an appellate court conducting harmless-error review cannot rely on record evidence that the instructions did not require the jury to consider. But those cases preceded this Court's decisive adoption of harmless-error review in *Chapman*, and, in any event, they involved trials in which the omitted (or misdescribed) element was subject to dispute, and reversal was therefore proper. Some of the Court's later cases contain similar indications (see *Sullivan*, *supra*; *Yates* v. *Evatt*, 500 U.S. 391 (1991)). But that reasoning stands in tension with a large body of this Court's harmless-error cases that mandate inquiry into whether the jury would have rendered the same verdict absent the constitutional error. That inquiry turns (and must turn) on what an appellate court concludes that a rational jury would have done if the error had not occurred. See, *e.g.*, *Pope* v. *Illinois*, 481 U.S. 497 (1987); *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986); *Crane* v. *Kentucky*, 476 U.S. 683 (1986); cf. *United States* v. *Bagley*, 473 U.S. 667 (1985). The latter form of inquiry better implements the values of harmless-error jurisprudence in this context, and should be followed here.

II. The federal crimes of mail fraud, wire fraud, and bank fraud do not contain an element of materiality. Those crimes require that the defendant devise a "scheme or artifice to defraud," but they contain no textual element of materiality. In light of the established principle that the elements of a federal criminal offense are subject to congressional definition and that the text of the statute is generally dispositive, there is no basis for importing a materiality

element where the text does not provide one. See *United States* v. *Wells*, 519 U.S. 482 (1997). That is particularly the case where, as here, this Court's decisions have never described mail fraud as requiring proof of materiality, and other federal statutes dealing with fraud do contain an explicit materiality element.

The argument to the contrary proceeds from the premise that Congress patterned the mail fraud statute (and its lineal descendants, the wire fraud and bank fraud statutes) on the common law, which, in criminal false pretenses and civil fraud cases, required proof of materiality. This Court, however, long ago rejected the argument that the mail fraud statute implicitly absorbed common-law restrictions. See *Durland* v. *United States*, 161 U.S. 306 (1896). Indeed, petitioner concedes that the common-law requirement of reliance is not an element of the offense. There is no persuasive evidence, in early mail fraud cases or legislative history, that supports a different result for materiality.

The essence of mail fraud is not that a victim be defrauded, or that it be reasonably likely that one would have been defrauded, but that the defendant devised a scheme by which he *intended* to defraud someone. The statute punishes the use of the mails with that intent, and it does not create a safe harbor for those whose schemes would not in fact succeed. Congress had good reason to make intent the key element in the offense, because that is the central factor that identifies culpability. There is no policy reason to require an extra-textual element of materiality to avoid punishing innocent behavior, and there is no ambiguity in the statute that triggers concern under the Due Process Clause or the rule of lenity. The federal fraud statutes are written broadly to protect victims and they should be enforced according to their terms.

ARGUMENT

I. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE MATERIALITY ELEMENT OF THE TAX OFFENSE WAS HARMLESS ERROR

There is no dispute in this Court that the district court erred by instructing the jury that it could find petitioner guilty of falsely reporting his income on his tax returns, in violation of 26 U.S.C. 7206(1), without making a finding whether the false statements on the tax returns related to a "material matter."[1] J.A. 255-256. The issue in this case is whether that error compels the reversal of petitioner's convictions under Section 7206(1), even though the evidence of materiality was incontrovertible and petitioner did not dispute materiality at trial. The court of appeals correctly concluded that petitioner's Section 7206(1) convictions should be affirmed under those circumstances. Pet. App. 11a-13a.

A. An Instructional Omission Or Misdescription Of An Element Of An Offense Is Not Per Se Harmful Error

1. Rule 52(a) of the Federal Rules of Criminal Procedure provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." See also 28 U.S.C. 2111 ("On the hearing of any

[1] Section 7206(1) provides that it is an offense to subscribe to a tax return under penalty of perjury when the taxpayer does not believe the return "to be true and correct as to every material matter." Although one court of appeals, in a 2-1 decision, has concluded that the materiality of false statements of income in a prosecution under Section 7206(1) presents a legal question for the court, see *United States* v. *Klausner*, 80 F.3d 55, 60-61 (2d Cir. 1996), the other courts of appeals that have addressed the issue have concluded that this Court's decision in *United States* v. *Gaudin*, 515 U.S. 506 (1995), requires submission of the materiality issue to the jury. See Pet. App. 11a (collecting cases). We do not press here any argument that the district court was correct in failing to submit the issue of materiality to the jury on the Section 7206(1) counts.

appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."). This Court's decisions make clear that *all* errors in federal criminal proceedings are subject to the harmless-error inquiry mandated by Rule 52(a).[2] See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-255 (1988) ("[A] federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a). * * * Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions."); *United States* v. *Lane*, 474 U.S. 438, 444-449 & n.11 (1986); cf. *Johnson* v. *United States*, 520 U.S. 461, 466 (1997) (in plain-error case, rejecting claim that Court should carve out exception to Rule 52 for "structural errors"; Rule 52 "by its terms governs direct appeals from judgments of conviction in the federal system, and therefore governs this case. * * * Even less appropriate than an unwarranted expansion of the Rule would be the creation out of whole cloth of an exception to it, an exception which we have no authority to make.").

In general, in order to affect substantial rights, an "error must have been prejudicial: It must have affected the outcome of the district court proceedings."[3] *United States* v.

[2] If no proper objection is made in the district court, however, errors in criminal cases are reviewed on direct appeal under the plain-error standard of Rule 52(b). See generally *United States* v. *Olano*, 507 U.S. 725 (1993).

[3] When, as in this case, the error at issue is of constitutional dimension, see *Gaudin*, 515 U.S. at 509-510, 522-523, the government bears the burden of showing beyond a reasonable doubt that the error did not affect the outcome of trial proceedings. See *Chapman* v. *California*, 386 U.S. 18, 21-24 (1967); *United States* v. *Hasting*, 461 U.S. 499, 510-511 (1983). When the error is not of constitutional dimension, the government bears the

Olano, 507 U.S. 725, 734 (1993); see, *e.g.*, *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986). The Court has recognized, however, a narrow class of fundamental constitutional errors that are intrinsically harmful, requiring reversal under the harmless-error test even though they may have had no effect on the outcome of trial proceedings.[4] See, *e.g.*, *Olano*, 507 U.S. at 735 (referring to errors that deprive defendants of the "basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair") (quoting *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986)).

In several cases involving state convictions, this Court has referred to errors that are intrinsically harmful as "structural errors." See, *e.g.*, *Arizona* v. *Fulminante*, 499 U.S. 279, 309-310 (1991). More recently, the Court has suggested that this terminology has no place in cases, such as the present one, involving "direct appeals from judgments of conviction in the federal system." *Johnson*, 520 U.S. at 466. However the class of intrinsically harmful errors is denominated, the Court has emphasized that it is "very limited." *Id.* at 468. In a criminal prosecution, "if the defendant had counsel and was tried by an impartial adjudicator, there is a

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burden of demonstrating that the error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946).

[4] At times the Court has suggested that the harmless-error inquiry is wholly inapplicable to this class of errors. See, *e.g.*, *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991) (such errors "defy analysis by 'harmless-error' standards"). Given the Court's reiteration in *Johnson* that all errors in federal criminal proceedings are subject to Rule 52, 520 U.S. at 466, a more precise description is that reflected in this Court's decision in *Olano*: although all errors are subject to the harmless-error inquiry required by Rule 52, some errors are so fundamental as to be intrinsically harmful, *i.e.*, to affect substantial rights even if they have no effect on the outcome of the proceedings. 507 U.S. at 734-735.

strong presumption that any errors that may have occurred are subject to harmless-error analysis." *Rose*, 478 U.S. at 579. See also *Fulminante*, 499 U.S. at 306 ("[M]ost constitutional errors can be harmless.").

This Court has found constitutional errors to be intrinsically harmful only where they "infect the entire trial process," *Brecht* v. *Abrahamson*, 507 U.S. 619, 630 (1993), and "necessarily render a trial fundamentally unfair," *Rose*, 478 U.S. at 577. See also, *e.g.*, *Fulminante*, 499 U.S. at 309, 310 (errors that affect "[t]he entire conduct of the trial from beginning to end" and "the framework within which the trial proceeds"); *Satterwhite* v. *Texas*, 486 U.S. 249, 256 (1988) ("Some constitutional violations, however, by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless."); *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986) ("[S]ome constitutional errors * * * are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case."). The Court has found such error "only in a very limited class of cases." *Johnson*, 520 U.S. at 468. See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand jury); *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984) (denial of public trial); *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of self-representation); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (complete denial of counsel); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (biased judge).

2. The type of error at issue here—an error in the jury instructions involving only a single element of an offense—bears no relation to the pervasive and fundamental errors that the Court has found intrinsically harmful. To paraphrase this Court's decision in *Rose*,

> [Petitioner] received a full opportunity to put on evidence and make argument to support his claim of

> innocence. He was tried by a fairly selected, impartial jury, supervised by an impartial judge. Apart from the challenged [materiality] instruction, the jury in this case was clearly instructed that it had to find [petitioner] guilty beyond a reasonable doubt as to every element of [subscribing to a false tax return]. * * * Placed in context, the erroneous [materiality] instruction does not compare with the kinds of errors that automatically require reversal of an otherwise valid conviction.

478 U.S. at 579.

It therefore should not be surprising that this Court has refused to apply a rule of automatic reversal to such errors. In *Rose*, the trial court instructed the jury in a second-degree murder case that, unless the presumption was rebutted, malice is presumed solely from the fact that "a killing has occurred." 478 U.S. at 574. Although the Court assumed (*id.* at 576 n.5) that the instruction violated the defendant's constitutional right to have his guilt determined beyond a reasonable doubt by a jury, see *Sandstrom* v. *Montana*, 442 U.S. 510, 523-524 (1979), the Court held that such an error can be harmless under "*Chapman's* harmless-error standard." 478 U.S. at 582. In another unconstitutional-presumption case, *Carella* v. *California*, 491 U.S. 263 (1989) (per curiam), the trial court erroneously gave the jury instructions that "directly foreclosed independent jury consideration of whether the facts proved established certain elements of the offense with which [the defendant] was charged," and that "relieved the State of its burden of * * * proving by evidence every essential element of [the] crime beyond a reasonable doubt." 491 U.S. at 266. The Court held that although the "instructions violated the Fourteenth Amendment," they were "subject to the harmless-error rule." *Id.* at 266. See also *Yates* v. *Evatt*, 500 U.S. 391, 404-405 (1991) (erroneous rebuttable presumptions can be harmless).

The Court has also approved application of the harmless-error doctrine to instructions that erroneously describe elements of the offense. In *Pope* v. *Illinois*, 481 U.S. 497 (1987), the trial court erroneously instructed the jury that to find the defendant guilty in an obscenity case, it had to find that the material at issue lacked value under "community standards," as opposed to the "reasonable person" standard required by the First Amendment. *Id.* at 499-501. This Court nevertheless concluded that the unconstitutional misdescription of the element could be harmless "if a reviewing court concludes that no rational juror, if properly instructed, could find value in the [defendant's material]." *Id.* at 503.

The Court has applied the same approach to omissions of features of a criminal offense. In *California* v. *Roy*, 519 U.S. 2, 3 (1996) (per curiam), the state trial court erroneously omitted to instruct the jury that it could convict the defendant as an aider and abetter only if it found that the defendant had the "intent or purpose" of aiding the principal's crime. *Id.* at 3 (emphasis omitted). The defendant ultimately sought federal habeas relief based on the instructional deficiency, and this Court held that "[t]he case before us is a case for application of the 'harmless error' standard." *Id.* at 5.[5] The Court therefore remanded the case for further proceedings to determine whether the error was harmless. *Id.* at 6.

The analysis in *Roy* is particularly relevant to this case. In *Roy*, the jury was not instructed that it needed to make a finding as to the existence of an intent to aid the principal. 519 U.S. at 3. As the Court pointed out, that error could with equal reason be "characterized as a misdescription of an

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[5] Because the defendant in *Roy* raised his claim in federal habeas proceedings, the claim was subject to the harmless-error standard enunciated in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), rather than to the stricter standard applicable to constitutional claims of error raised on direct appeal. See *Brecht*, 507 U.S. at 637. See also note 3, *supra*.

element of the crime," *i.e.*, the element of *mens rea*, or as the "omission" of an element of the crime, *i.e.*, the element of intent to aid the principal. *Id.* at 5 (internal quotation marks omitted). *Roy* illustrates that whether an instructional error takes the form of a "misdescription" of a broadly drawn element or as an "omission" of a narrowly drawn one turns on nothing more than the particular way in which a given set of instructions happens to divide the offense into elements and sub-elements. For example, the tax offense at issue here requires that the defendant subscribe to a tax return "which he does not believe to be true and correct as to every material matter." 26 U.S.C. 7206(1). Two leading jury-instruction treatises treat that requirement as a single element, of which materiality is a part, rather than treating materiality as an element in its own right. See 2 E. Devitt et al., *Federal Jury Practice and Instructions: Criminal* § 56.15, at 1019 (4th ed. 1990); 3 L. Sand et al., *Modern Federal Jury Instructions* ¶ 59.03, at 59-45, 59-50 (1998). As in *Roy*, therefore, the error in this case can easily be viewed as a misdescription of an element rather than the complete omission of one. Cf. *Johnson*, 520 U.S. at 469 ("The failure to submit materiality to the jury * * * can just as easily be analogized to improperly instructing the jury on an element of the offense."). In any event, as petitioner acknowledges (Br. 19), the difference between a misdescription and an omission is simply a matter of form, and the two forms of error are properly treated as identical in inquiring into harmlessness.

3. Relying on *Cabana* v. *Bullock*, 474 U.S. 376, 384-385 (1986), as well as several earlier decisions of this Court, petitioner contends that "[a]n incomplete jury verdict" can never be harmless. Br. 15, 17, 25 (citing *Cabana*, *United Bhd. Of Carpenters & Joiners* v. *United States*, 330 U.S. 395 (1947), and *Bollenbach* v. *United States*, 326 U.S. 607, 613-614 (1946)). In *Pope*, however, this Court expressly overruled *Cabana* and earlier of its cases that could have been viewed as supporting petitioner's broad claim:

> To the extent that cases prior to *Rose* [v. *Clark*, 478 U.S. 570 (1986)] may indicate that a conviction can never stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, see, *e.g.*, *Cabana*, * * *, after *Rose*, they are no longer good authority.

481 U.S. at 504 n.7.

More generally, the cases decided before *Chapman* are inapposite, because it was not until *Chapman* that the Court clearly rejected the argument that *all* constitutional errors are categorically immune from harmless-error review. See *Chapman*, 386 U.S. at 42 (Stewart, J., concurring) (until *Chapman*, Court had "steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless'") (collecting cases). Consequently, the pre-*Chapman* decisions cited by petitioner lack the necessary "strong presumption" that a constitutional error can be rendered harmless if it does not contribute to the verdict obtained. *Rose*, 478 U.S. at 579.[6]

Furthermore, although the pre-*Chapman* cases cited by petitioner contain broad language, the element that was omitted or misdescribed in each case was contested and possibly outcome-determinative. See, *e.g.*, *Carpenters*, 330 U.S. at 408-409, 411-412 ("the necessity * * * for an instruction [on agency issue] is apparent" because, given parties' varying degrees of involvement in charged conduct, "the verdict might have resulted from the incorrect instruction," and, even with respect to defendants who did not object at trial, reversal was required because "[t]he erroneous charge was on a vital phase of the case"); *Bollen-*

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[6] We discuss below the post-*Chapman* cases upon which petitioner relies. See pp. 22-26, *infra*.

bach, 326 U.S. at 613-614 (where erroneous instruction in response to the jury's question on "a basic issue" in the case resolved a seven-hour jury deadlock within five minutes, "[i]t would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous [instruction] given them as a guide"). Reversal in such circumstances is entirely consistent with our submission in this case, because an elemental omission or misdescription may be found harmless only where the reviewing court can conclude beyond a reasonable doubt that the error at issue did not affect the outcome of the proceedings, *i.e.*, where "the error complained of * * * [did not] contribute to the verdict obtained." *Chapman*, 386 U.S. at 24.

B. The Failure To Instruct The Jury On The Materiality Requirement Of The Tax Offense Was Harmless Because Materiality Was Undisputed And Supported By Incontrovertible Evidence

1. The district court's failure to instruct the jury on the materiality requirement of the tax offense was harmless error that did not "contribute to the verdict obtained," *Chapman*, 386 U.S. at 24, because materiality was undisputed and supported by incontrovertible evidence. At trial, the government introduced evidence that petitioner failed to report on his personal income-tax return more than $1 million in income for 1985 and more than $4 million in income for 1986. Pet. App. 12a. Petitioner's defense at trial was that he reasonably believed that the unreported sums were not income. See J.A. 208-211, 235 (closing argument). Petitioner did not dispute that the unreported sums exceeded $5 million, and that if they were income they were material to a determination of the income tax he owed.[7] The evidence

[7] Specifically, petitioner introduced no evidence even arguably suggesting that his failure to report more than $5 million in income could be viewed as immaterial, and at no point in the proceedings has he suggested that acquittal could conceivably be proper on that ground. It is true, as petitioner observes (Br. 22-23), that petitioner's failure to dispute the issue of materiality did not relieve the government of its obligation to prove materiality to the jury beyond a reasonable doubt. That observation, however, establishes no more than that the failure to instruct the jury on materiality in this case was error. The present issue is whether that error was harmless, and petitioner's failure to contest materiality is quite relevant to that issue.

that petitioner failed to report such substantial income incontrovertibly demonstrates that the false statements on petitioner's 1985 and 1986 tax returns were material to a determination of his income-tax liability. See, *e.g.*, *United States* v. *Holland*, 880 F.2d 1091, 1096 (9th Cir. 1989) ("any failure to report income is material") (citing cases).[8]

The harmless-error doctrine is rooted in the principle that "the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Van Arsdall*, 475 U.S. at 681. The doctrine reflects the further principle that "public respect for the criminal process" is promoted "by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Ibid.* Under those principles, the failure to submit the requirement of materiality to the jury was harmless error in this case. The trial in this case determined petitioner's guilt or innocence of the tax offenses. By its verdict of guilty, the jury necessarily found (1) that petitioner signed an income-tax return under penalty of perjury; (2) that on this return petitioner falsely reported his income in 1985 and 1986; (3) that the petitioner knew his statements were false; and (4) that petitioner made the statements purposely. See

[8] In general, a statement is material if it has "a natural tendency to influence, or [is] capable of influencing" the victim. *Gaudin*, 515 U.S. at 509. A number of the courts of appeals, including the court below, employ a particularized definition of "materiality" applicable to the offense of falsely subscribing to a tax return under 26 U.S.C. 7206(1). See Pet App. 12a ("Under § 7206(1), a 'material matter' is any information necessary to a determination of a taxpayer's income tax liability.") (citing cases).

J.A. 256. Further, the record evidence that petitioner failed to report over $5 million in income incontrovertibly establishes what the district court expressly found (J.A. 167) and what petitioner could not and did not dispute: that petitioner's massive misstatement of income was material to a calculation of his income-tax liability. See, *e.g.*, *United States* v. *Uchimura*, 125 F.3d 1282, 1287 (9th Cir. 1997) (jury's failure to determine materiality of defendant's substantial understatement of income on tax return did not justify reversal in plain-error case; "surely [the] omitted income was necessary to a determination of whether income tax was owed"), cert. denied, 119 S. Ct. 151 (1998).

A holding that the instructional error in this case does not mandate reversal would promote public respect for the criminal process, by giving effect to the underlying fairness of petitioner's trial. As this Court has recognized in conducting plain-error review of a forfeited claim of instructional error, where a trial judge fails to submit the element of materiality to the jury, but the element is "essentially uncontroverted at trial" and is supported by "overwhelming" evidence, the forfeited error does not "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 469-470 (internal quotation marks omitted). "Indeed, it would be the reversal of a conviction such as this which would have that effect. 'Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.'" *Ibid.* (quoting R. Traynor, *The Riddle of Harmless Error* 50 (1970)).

Because it is simply impossible to dispute the materiality of petitioner's failure to report $5 million in income on his tax returns, petitioner, if granted a retrial on the Section 7206(1) counts, surely would not use that trial as an opportunity to seek to persuade the jury that he should be acquitted on that basis. Rather, he seeks a retrial on those counts to obtain a second chance with a jury on the elements as to which the

jury at the first trial was properly instructed, and properly found petitioner guilty. Nothing in the Constitution requires that petitioner be given that unwarranted opportunity.

2. Petitioner nevertheless contends (Br. 14-15) that his conviction must be reversed because (he asserts) for a reviewing court to affirm a conviction by relying on incontrovertible evidence introduced against a defendant on an uncontested element would be tantamount to entering a directed verdict of guilty on an offense. Petitioner's contention is incorrect.

a. Petitioner's analogy to a directed verdict is inapt. If a trial court were to direct a verdict of guilty on an offense, the defendant's constitutional right to have the jury determine guilt would be completely abrogated. See *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). The complete deprivation of that basic right is comparable to the other "fundamental and pervasive" constitutional errors that the Court has found to be intrinsically harmful. *Van Arsdall*, 475 U.S. at 681. "Where that right [to a jury trial] is *altogether* denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty." *Rose*, 478 U.S. at 578 (emphasis added).

The situation in this case is quite different. Petitioner received a fair trial, full jury consideration of his defense, and a formal jury verdict under instructions that specified the proper burden of proof and correctly defined every element except one that he did not contest and could not conceivably have contested. The error in the case is not that the wrong entity judged petitioner guilty; rather, it is that the entity that judged him guilty did so under incorrect instructions. It is true that the error "alter[ed] the terms under which the jury considered [petitioner's] guilt or innocence, and therefore * * * theoretically impair[ed] [his] interest in having a jury decide his case." *Rose*, 478 U.S. at 582 n.11. But the same is true of "other errors that may

have affected either the instructions the jury heard or the record it considered—including errors such as mistaken admission of evidence, or unconstitutional comment on a defendant's silence, or erroneous limitation of a defendant's cross-examination of a prosecution witness." *Ibid.* The defendant's Sixth Amendment right to a jury trial does not "forbid[] a reviewing court to decide the impact of [such errors] on the outcome" of the trial. *Ibid.*[9]

b. Petitioner relies heavily (Br. 14-17, 21, 25-29) on this Court's holding in *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), that a constitutionally defective reasonable-doubt instruction can never be harmless. The holding of *Sullivan* is entirely consistent with our submission in this case. The erroneous reasonable-doubt instruction in *Sullivan* "vitiate[d] *all* the jury's findings." 508 U.S. at 281 (emphasis in original). It therefore fits within the narrow category of constitutional errors that "are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case." *Van Arsdall*, 475 U.S. at 681. In contrast, the instructional omission or misdescription of a single element does not "vitiate[] *all* the jury's findings," *Sullivan*, 508 U.S. at 281, and the holding of

[9] There is no novelty in the conclusion that a complete deprivation of the right to jury trial on an offense is necessarily harmful, while errors that have a less pervasive impact on the jury's consideration of an offense may be harmless. This Court has recognized in other contexts that the *degree* of a constitutional error can determine whether the error can ever be harmless. See *Satterwhite*, 486 U.S. at 256-257 (although "Sixth Amendment violations that *pervade the entire proceeding*" cannot be harmless, case-specific inquiry into harmlessness is appropriate "where the evil caused by a Sixth Amendment violation is limited to the erroneous admission of particular evidence at trial") (emphasis added); compare *Gideon*, 372 U.S. 335 (total denial of counsel mandates reversal in all cases), with *Strickland* v. *Washington*, 466 U.S. 668, 695 (1984) (ineffective assistance of counsel requires showing of "reasonable probability that, absent [counsel's] errors, the factfinder would have had a reasonable doubt respecting guilt").

Sullivan does not draw into question this Court's cases establishing that such an error can be harmless. See pp. 14-16, *supra*.

Petitioner also relies (Br. 25-26), however, on a particular line of reasoning utilized in *Sullivan*. In holding that constitutionally defective reasonable-doubt instructions are necessarily harmful, the Court in *Sullivan* explained that, when such an error occurs, "there has been no jury verdict within the meaning of the Sixth Amendment," and therefore "[t]here is no *object*, so to speak, upon which harmless-error scrutiny can operate." 508 U.S. at 280. Petitioner argues that this reasoning should be extended to cases, such as this one, in which the jury is erroneously instructed on an element of an offense. That extension of *Sullivan* would be unwarranted.

The verdict of a jury in a criminal case is the product of the evidence placed before the jury and the instructions given to the jury about relevant legal principles, including the burden of proof, the elements of the charged offense, and the proper assessment of evidence. Whenever there is a constitutional error involving any of those components—evidentiary or instructional—it could be said that the resulting verdict is not the kind of verdict required by the Constitution, and thus that there is essentially no verdict upon which to conduct an inquiry into harmlessness.[10] The

[10] That figure of speech can be applied equally to evidentiary and instructional errors. For example, in a case in which the defendant was unconstitutionally prohibited from presenting some or all of the admissible evidence in his defense, one could say that the jury's verdict of guilty was no verdict at all, in the sense the Constitution requires, because the Constitution presupposes a verdict of guilt based not only on the government's evidence but also on the constitutionally admissible defense evidence. Cf. J. Greabe, *Spelling Guilt Out of a Record? Harmless-Error Review of Conclusive Mandatory Presumptions and Elemental Misdescriptions*, 74 B.U. L. Rev. 819, 848 (1994) ("Put another way, the verdict is no more valid when the jury finds guilt beyond a reasonable doubt

availability of that figure of speech, however, is not a sufficient basis upon which to conclude that a given error is automatically harmful. To the contrary, "there is a strong presumption" that constitutional errors "alter[ing] the terms under which the jury considered the defendant's guilt or innocence," *Rose*, 478 U.S. at 579, 582 n.11, can be harmless, and only a "limited category" of "fundamental and pervasive" errors are automatically harmful, *Van Arsdall*, 475 U.S. at 681-682.

Sullivan reflects the judgment that the failure to instruct a jury properly on the requirement of guilt beyond a reasonable doubt is error so fundamental and pervasive that it "vitiates" the jury's entire verdict in way that forecloses any case-specific inquiry into harmless error. 508 U.S. at 281. That judgment is fully consistent with this Court's repeated holding that instructional errors affecting the definition of a single element are properly subject to a case-specific inquiry into harmlessness.

C. Harmless-Error Review Of Undisputed And Incontrovertible Omitted Elements Does Not Exceed The Proper Role of An Appellate Court

Petitioner contends that the absence of a jury finding on materiality forecloses affirmance in this case, because "[t]he [harmless-error] inquiry * * * is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict *actually rendered* in this trial was surely unattributable to the error." Br. 11-12 (quoting *Sullivan*, 508 U.S. at 279 (emphasis supplied by petitioner)). He further argues (Br. 28) that appellate courts are not constitutionally competent to conduct harmless-error review based on what the jury would have found absent the error. There is support in some of this

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without considering admitted evidence likely to have affected its level of doubt, than when the jury finds guilt despite possibly having reasonable doubts.").

Court's instructional error cases for the conclusion that, in conducting harmless-error review, it is never appropriate to determine what a jury would necessarily have found in the absence of an error, as distinguished from what the jury actually did find despite that error. But other lines of this Court's harmless-error jurisprudence authorize just such an inquiry. We submit that the proper resolution of this tension is to hold that an appellate court can find an instructional omission harmless when it can conclude beyond a reasonable doubt that the element was uncontroverted and established by overwhelming proof, such that the jury verdict would have been the same absent the error.

1. In *Sullivan*, 508 U.S. at 280, the Court stated that an error cannot be deemed harmless where "[t]he most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt—not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error." In this case, the jury did enter a verdict of guilty beyond a reasonable doubt on the tax offenses, and that verdict would surely not have been different if the jury had been required to make a finding on materiality. *Sullivan* suggests, however, that the absence of a direct finding of materiality by the jury is necessarily fatal, because "[t]he Sixth Amendment requires more than appellate speculation about a hypothetical jury's action."[11] *Ibid.*

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[11] *Sullivan* does acknowledge that a reviewing court may affirm, despite an error affecting the jury's finding on an element of an offense, if "no rational jury could find" what the jury found on the elements properly submitted to it "without also finding" for the government on the improperly instructed element. 508 U.S. at 281 (internal quotation marks omitted). In such circumstances, the Court explained, the jury's findings are "functionally equivalent to finding the [improperly instructed] element." *Ibid.* As we explain *infra*, note 14, the jury's findings in this case on the properly instructed elements of the tax offense are in the same sense "functionally equivalent" to a finding of materiality.

Similarly, in *Yates* v. *Evatt*, the Court stated that, in conducting harmless-error review of an erroneous burden-shifting presumption, reviewing courts must limit their consideration of the record to evidence that the jury could and would have considered under the instructions it received on the element in question. 500 U.S. at 405-406, 409. A logical extension of that reasoning would mean that harmless-error review in light of the record evidence is virtually impossible when the jury instructions entirely omit an element, because the jury instructions would not have authorized consideration of the evidence, insofar as it was relevant to that element, at all.

Neither *Sullivan* nor *Yates* involved the failure to instruct the jury on an element of an offense that was undisputed and incontrovertible. But the approach reflected in those cases does provide support for petitioner's claim that his convictions on the tax offenses cannot properly be affirmed on the ground that he would certainly have been convicted at trial if the jury had been instructed on materiality. There is, however, a substantial body of contrary authority from this Court, holding that it can be appropriate to affirm a conviction on the ground that the defendant would certainly have been convicted at trial if the error at issue had not occurred. See, *e.g.*, *Hasting*, 461 U.S. at 510-511 ("The question a reviewing court must ask is this: absent [the constitutional error at issue,] is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?"). For reasons discussed below, this Court should adhere to that principle in the present setting. And under that approach, petitioner's tax convictions should properly be affirmed, because there can be no doubt that the jury would still have found petitioner guilty if it had been instructed on the undisputed element of materiality.

2. The claim that it is never permissible to look to whether the jury's verdict would have been the same in the absence of the challenged error cannot logically be squared

with this Court's cases holding that the unconstitutional exclusion of defense evidence can be harmless. For example, it can be harmless error for a trial court to violate the Confrontation Clause by erroneously denying the defendant an opportunity to elicit impeaching testimony on cross-examination of a prosecution witness. *Van Arsdall*, 475 U.S. at 680-684. See also, *e.g.*, *Coy* v. *Iowa*, 487 U.S. 1012, 1021-1022 (1988) (denial of right to face-to-face confrontation of witness can be harmless); *Crane* v. *Kentucky*, 476 U.S. 683, 691 (1986) (unconstitutional exclusion of evidence relating to reliability of defendant's confession can be harmless error). In such cases, the jury that actually decided the case never heard the excluded evidence, and thus it is impossible to determine the actual effect of the error on that jury. Rather, the inquiry necessarily must be whether it is clear beyond a reasonable doubt that a rational jury would have found guilt had the excluded evidence been placed before it.

A similar harmless-error analysis must occur when the jury hears evidence that the Constitution demands be excluded. A reviewing court cannot be certain whether the jury actually relied on the unconstitutionally admitted evidence or instead on the properly admitted evidence. But harmless-error review can ask whether the verdict is the same as that which would have resulted in the absence of the inadmissible evidence. See, *e.g.*, *Brown* v. *United States*, 411 U.S. 223, 231 (1973) (admission of confessions of non-testifying co-defendants, in violation of *Bruton* v. *United States*, 391 U.S. 123 (1968), harmless because independent evidence of guilt was overwhelming); *Milton* v. *Wainwright*, 407 U.S. 371, 372-373 (1972) (admission of defendant's unlawfully obtained confession harmless because jury "was presented with overwhelming evidence of * * * guilt"); *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972) (*Bruton* violation harmless because "minds of an average jury would not have found the State's case significantly less persuasive" in absence of co-defendant's confession) (internal quotation

marks omitted); *Harrington* v. *California*, 395 U.S. 250, 253-254 (1969) (same).[12]

Those forms of harmless-error inquiry are essentially like the inquiry required in the present case: in each situation, the reviewing court must determine how a reasonable jury *would have* rendered its verdict absent error. When the reviewing court can be confident beyond a reasonable doubt that the error would not have altered the jury's verdict, the error should be held harmless. Where that degree of confidence does not exist, reversal is appropriate.

There is therefore no merit to petitioner's claim (Br. 28) that it is outside the judicial province and competence to inquire into what a reasonable jury would have done absent an error. In addition to the contexts discussed above, the Court has directed that such an inquiry be conducted in other settings as well. See, *e.g.*, *United States* v. *Bagley*, 473 U.S. 667, 684 (1985) (prosecutor's failure to disclose exculpatory evidence violates Due Process Clause if "there is a reasonable probability" that, had the evidence been disclosed, "the result of the trial would have been different"); *Strickland* v. *Washington*, 466 U.S. 668, 695 (1984) (Sixth Amendment claim of ineffective assistance of counsel requires showing of "reasonable probability that, absent [counsel's] errors, the factfinder would have had a reasonable doubt respecting guilt"). Indeed, in the plain-error context, this Court has made clear that where the evidence is undisputed and incontrovertible, the failure to submit an element to the jury cannot have affected the verdict and does not warrant reversal. In *Johnson*, 520 U.S. at 470, the Court held that, where the defendant does not properly object at trial, a reviewing court may find that the unconstitutional failure to

[12] Although petitioner implies (Br. 27) that this line of authority was overruled by *Sullivan*, that is incorrect. Nothing in the unanimous opinion in *Sullivan* suggests—implicitly or otherwise—that the Court was overruling any of its prior decisions. See 508 U.S. at 276-282.

submit materiality to the jury does not call into question the fairness, integrity, or public reputation of judicial proceedings provided that proof of materiality was "overwhelming" and "essentially uncontroverted."

Petitioner also errs in suggesting (Br. 16) that the inquiry into what a reasonable jury would have done in the absence of an error is inherently more likely to call for impermissible speculation than is the inquiry into whether an error in fact had an effect on the actual jury. Because a reviewing court is normally unable to "retrace the jury's deliberative process," *Pope*, 481 U.S. at 503 n.6, the inquiry into the effect of an error on the actual jury necessarily collapses into the reviewing court's judgment of the likely effect of the error on a reasonable jury. That judgment can in many cases be substantially more difficult than the conclusion in the present case that no reasonable jury could have found petitioner's failure to report over $5 million in income immaterial. See, *e.g.*, *Milton*, 407 U.S. at 372-373 (in light of overwhelming evidence, affirming defendant's conviction notwithstanding erroneous admission of confession by defendant).

3. This Court has, in fact, endorsed harmless-error review for instructional errors where the jury did not itself make a finding on an omitted or misdescribed element. In *Pope*, the jury was erroneously instructed that it could convict the defendant of an obscenity offense if it found that the materials at issue lacked value under a community standard, rather than under the objective "reasonable person" standard required by the First Amendment. 481 U.S. at 499-501. There was no reason in *Pope* to believe that the jury had considered whether the materials at issue were objectively valueless, much less that it made a finding on the point. *Id.* at 503 n.6. The Court nevertheless held that the conviction in *Pope* should properly be affirmed "if a reviewing court concludes that no rational juror, if properly instructed, could find value" in the material at issue. *Id.* at

503. See also *id.* at 503 n.6 (conviction should be affirmed if "the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same").

Similarly, in *Rose*, the jury was improperly instructed to presume malice simply from the fact that a killing had occurred. 478 U.S. at 574. Although the jury was also told that this presumption was rebuttable, there was no reason to believe that the jury's guilty verdict reflected an independent finding of malice properly defined, rather than a finding that a killing had occurred and that the consequent inference of malice had not been rebutted. See *Pope*, 481 U.S. at 503 n.6 (*Rose* was not "based on the fiction that a reviewing court could say beyond all reasonable doubt that the jury *in fact* did not have the impermissible burden-shifting instruction in mind when it concluded that the defendant killed with malice"). Despite the absence of a proper finding on the element of malice, the Court held that the error could be harmless if, in the circumstances of the case, the jury's finding that the defendant committed the killing "conclusively establish[ed] [intent], so that no rational jury could find that the defendant committed the [killing] but did not *intend* to cause injury."[13] *Rose*, 478 U.S. at 580-581.

Pope and *Rose* do differ from this case in that the jury here did not deliberate on the materiality element at all, while the jury in those cases did deliberate on the element at

[13] There is a passage in *Rose* stating that constitutional errors may be found harmless if the "reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt." 478 U.S. at 579. That passage could be understood to suggest that a constitutional error is harmless whenever the reviewing court determines that the evidence at trial was sufficient to support the defendant's conviction. The Court has subsequently disavowed that specific passage, see *Yates*, 500 U.S. at 403 n.8, while making clear that *Rose* remains good law. See, *e.g.*, *Johnson*, 520 U.S. at 469 (relying on *Rose*); *Sullivan*, 508 U.S. at 279-281 (same).

issue, albeit under inadequate instructions. See, *e.g.*, *Rose*, 478 U.S. at 580 n.8 (noting that, in that case, the element was not entirely removed from the jury). But that distinction cannot constitute a watershed in harmless-error analysis. In *Pope*, for example, harmless-error review entailed consideration of what the jury would have found on the improperly presented element *if* it had deliberated on the issue; there was no jury finding on the relevant "reasonable person" standard at all. Nor does that distinction explain *Rose*. It is possible to understand *Rose* as involving a somewhat different form of harmless-error analysis than that at issue here, *i.e.*, an analysis that permits affirmance when, given the jury's findings on the matters it did consider, no rational jury could have failed to find the omitted or misdescribed element. See *Rose*, 478 U.S. at 580-581; *Sullivan*, 508 U.S. at 280-281. That analysis differs only in form, however, from a case in which the jury makes no findings on a particular issue or element.[14] In either instance, a reviewing court must ask what a rational jury would have done based on the evidence at issue in the case, even though the jury did not make a proper finding on an element of an offense.

Acceptance of petitioner's broad thesis that such a question is always impermissible would have sweeping consequences for this Court's jurisprudence. Petitioner's view

[14] In *Rose* itself, for example, the question was whether the jury's findings on the circumstances of the killing were such that no rational jury that found the killing could have failed to find malice (*i.e.*, intent to inflict serious bodily injury). The extrapolated finding on malice is not one that the jury necessarily made (since the instructions did not require it to do so), but is one that it rationally should have made had it considered the issue. The same is true in this case. No jury that found that petitioner falsely understated his income on his tax returns (by millions of dollars) could rationally have found that those misstatements were immaterial. Thus, affirmance would be proper in this case even under the more restrictive "functional equivalence" test that this Court endorsed in *Sullivan*, 508 U.S. at 280-281.

(Br. 29) that "appellate courts [cannot be given] even the slightest latitude to review the record to 'fill the gaps' in a jury verdict, as 'minor' as those gaps may seem," would mandate reversal not only for total omissions of an element, such as the pre-*Gaudin* omission of materiality in this case. It would also mandate reversal for virtually any error in defining the elements of the offense. After all, any misdescription that rises to the level of constitutional error would appear necessarily to defeat the jury's ability to render a finding on the issue. And given the complexity of many federal crimes and the severe time pressures under which trial courts must often formulate jury instructions, the category of reversals required would be large indeed. Even the logical extrapolation from jury findings endorsed in *Rose* and *Sullivan* would be barred under petitioner's approach.

That would not be the only ramification of petitioner's theory. Taken to its logical conclusion, petitioner's premise (Br. 12) that courts may not inquire into what a rational jury would have done in the absence of the error would require reconsideration of the many cases in which this Court has directed that precise method of harmless-error analysis. See pp. 26-29, *supra*. In each of those cases, there is (as here) a general jury verdict, but the verdict may be tainted by constitutional error in ways that cannot be empirically known. Harmless-error inquiry in those contexts necessarily must decide, not what the jury actually did, but what a rational jury would have done based on the record at issue.

Petitioner's submission should be rejected. Although the jury instructions in this case did not produce a finding on materiality for the tax offenses, they did require findings on all of the elements on which petitioner could have based, and did base, his defense, and they resulted in a general verdict of guilty. Reversal based on the jury's failure to consider an issue on which there was, and could be, no dispute, serves no sufficient purpose, for the verdict would have been the same absent the error. The error was therefore harmless, and

petitioner's convictions on the tax offenses should be affirmed.[15]

II. MATERIALITY IS NOT AN ELEMENT OF THE FEDERAL MAIL FRAUD, BANK FRAUD, AND WIRE FRAUD STATUTES

A. The Mail Fraud, Wire Fraud, And Bank Fraud Statutes Have No Textual Requirement of Materiality

1. "The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 511 U.S. 600, 604 (1994) (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)). Thus, "in determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is usually dispositive." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986). Applying that principle, this Court recently held in *United States* v. *Wells*, 519 U.S. 482 (1997), that the crime of "knowingly mak[ing] any false

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[15] Because the court of appeals found that materiality was not an element of the offenses of mail fraud, wire fraud, and bank fraud, Pet. App. 6a-9a, it did not reach the question whether any error in the instructions on those counts was harmless. The United States argued below that the failure to submit materiality to the jury on the numerous fraud counts was harmless, if error, because proof of materiality was overwhelming and petitioner did not dispute materiality at trial. Gov't Second Supp. C.A. Br. 16-34. Petitioner contended that proof of materiality as to those charges was neither overwhelming nor undisputed. See Pet. C.A. Supp. Reply Br. 10-18, 21. The court of appeals did not resolve those fact-intensive issues. If the Court were to hold that materiality is an element of the fraud offenses, it would be appropriate to remand the case for further proceedings on the issue of harmless error. The precise scope of any such proceedings would turn in part on the Court's ruling in this case on the harmlessness of the error on the tax offenses. Such proceedings would in any event present the question whether any error on the fraud offenses was harmless in light of the jury's findings on the elements properly submitted to it. See Gov't Supp. C.A. Br. 9-10; Gov't Second Supp. C.A. Br. 20-21, 23-24, 27, 31, 34.

statement or report" to a federally insured financial institution, 18 U.S.C. 1014, contains no materiality requirement. The cornerstone of that holding was the Court's observation that "[n]owhere does [the statute] * * * say that a material fact must be the subject of the false statement or so much as mention materiality." 519 U.S. at 490.

What was true of Section 1014 in *Wells* is equally true of the statutes at issue here, which require that the defendant devise or intend to devise a scheme or artifice to defraud, but do not require that the artifice or scheme employ *material* falsehoods.[16] See 18 U.S.C. 1341, 1343, 1344.

The absence of an explicit requirement of materiality in the mail fraud, wire fraud, and bank fraud statutes is particularly telling because Congress has enacted other statutes punishing fraudulent conduct that do contain express materiality requirements. See, *e.g.*, 21 U.S.C. 843(a)(4)(A) (furnishing of "false or fraudulent material information" in documents required under federal drug abuse laws); 26 U.S.C. 6700(a)(2)(A) (statement with respect to investment tax benefits that person "knows or has reason to know[] is false or fraudulent as to any material matter"). In

[16] The mail fraud statute was enacted in 1872 as part of the recodification of the postal laws. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323. The wire fraud statute, which was enacted in 1952, parallels in relevant part the language of the mail fraud statute. See 18 U.S.C. 1343. The bank fraud statute, which was enacted in 1984, was modeled on the mail fraud and wire fraud statutes. S. Rep. No. 225, 98th Cong., 1st Sess. 378 (1983). Although the bank fraud statute is worded slightly differently from the other two provisions, using the phrase "executes, or attempts to execute" in place of "having devised or intending to devise," we agree with petitioner (Br. 30-31 n.13) that the three provisions should be interpreted consistently. Cf. *Carpenter* v. *United States*, 484 U.S. 19, 25 n.6 (1987) (applying "same analysis" to mail fraud and wire fraud statutes because they "share the same language in relevant part"). For ease of reference, we refer in this brief to the requirements of the provisions using the precise wording of the mail fraud statute, upon which the other two provisions were modeled.

light of Congress's express inclusion of a materiality requirement in other fraud statutes, the absence of the term "material" from the mail fraud, wire fraud, and bank fraud statutes "speaks volumes." *United States* v. *Shabani*, 513 U.S. 10, 14 (1994).

2. Just as there is no mention of materiality in the statutory text, so too there is no mention of materiality in this Court's decisions describing the elements of mail fraud. In construing the mail fraud statute in 1895, the Court noted that "three matters of fact must be charged in the indictment and established by the evidence":

> (1) That the persons charged must have devised a scheme or artifice to defraud. (2) That they must have intended to effect this scheme, by opening or intending to open correspondence with some other person through the post office establishment * * *. (3) And that, in carrying out such scheme, such person must have either deposited a letter or packet in the post office, or taken or received one therefrom.

Stokes v. *United States*, 157 U.S. 187, 188-189 (1895).

Congress amended the mail fraud statute in 1909,[17] deleting the second element of the offense set forth in *Stokes*, and expanding the prohibited "scheme[s] or artifice[s]" to include expressly those "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130. Shortly after that amendment, the Court again enumerated

[17] The original 1872 mail fraud statute was first amended in 1889 to make express provision for certain specific schemes of the period that are not relevant here. See Act of March 2, 1889, ch. 393, § 1, 25 Stat. 873. Much of the language added in 1889 was deleted "in 1948 in an amendment (Act of June 25, 1948, ch. 645, § 1341, 62 Stat. 763) designed to remove surplusage without changing the meaning of the statute. See H.R. Rep. No. 304, 80th Cong., 1st Sess., A100 (1947)." *McNally* v. *United States*, 483 U.S. 350, 357 n.6 (1987).

the elements of mail fraud, and again made no mention of materiality:

> [T]he elements of an offense under [the mail-fraud-statute] are (a) a scheme devised or intended to be devised to defraud, or for obtaining money or property by means of false pretenses, and, (b) for the purpose of executing such scheme or attempting to do so, the placing of any letter in any post office of the United States to be sent or delivered by the Post Office Establishment.

United States v. *Young*, 232 U.S. 155, 161 (1914); see also *Pereira* v. *United States*, 347 U.S. 1, 8 (1954) (same).

B. The Mail Fraud, Wire Fraud, and Bank Fraud Statutes Do Not Incorporate All Of The Elements Of A Common-Law Cause Of Action

1. Petitioner contends (Br. 32-38) that, despite the absence of any mention of materiality in the mail fraud, wire fraud, and bank fraud statutes, this Court should impute such a requirement because materiality is an element of the common-law tort of fraudulent misrepresentation and of the crime of false pretenses. It is true that civil common-law actions founded on fraudulent misrepresentations typically "require[] a *material* misrepresentation or omission." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 579 (1996); see also *Smith* v. *Richards*, 38 U.S. (13 Pet.) 26, 39 (1839) (a "misrepresentation must be of something material"); 1 J. Story, *Commentaries on Equity Jurisprudence* § 195, at 220 (13th ed. 1886) (in court of equity, fraud requires material misrepresentation). Similarly, the substantive crime of obtaining money or property by false pretenses typically requires proof of materiality. See, *e.g.*, *Woodbury* v. *State*, 69 Ala. 242, 245-246 (1881); 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.7(b)(4), at 386 (1986). It is also true that courts generally "presume that Congress incorporates the common-law meaning of the terms it uses if those terms . . .

have accumulated settled meaning under . . . the common law and the statute does not otherwise dictate." *Wells*, 519 U.S. at 491 (quoting *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 322 (1992)). Thus, if the language of the mail fraud, wire fraud, and bank fraud statutes indicated that Congress had codified the crime of false pretenses or one of the common-law torts sounding in fraud, petitioner might have a persuasive argument that the statutes should be interpreted to include all of the common-law elements of the crime or tort at issue, including materiality.

The language of the provisions at issue demonstrates, however, that Congress did not enact a common-law tort sounding in fraud or the crime of false pretenses. The mail fraud statute, for example, extends broadly to those who use the mails "having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. As this Court held over 100 years ago, the phrase "scheme or artifice to defraud" reaches well beyond those actions sustainable at common law or under the crime of false pretenses. See *Durland* v. *United States*, 161 U.S. 306 (1896). In *Durland*, a defendant challenged his conviction under the mail fraud statute on the ground that "the statute reaches only such cases as, at common law, would come within the definition of 'false pretenses,' in order to make out which there must be a misrepresentation as to some existing fact, and not a mere promise as to the future." *Id.* at 312. In construing the phrase "any scheme or artifice to defraud" for the first time, the Court held that "[t]he statute is broader than is claimed. Its letter shows this." *Id.* at 313. Accord *McNally* v. *United States*, 483 U.S. 350, 356 (1987) (under *Durland*, the phrase "scheme or artifice to defraud" is "to be interpreted broadly insofar as property rights are concerned").

In determining the scope of the statute, the *Durland* Court did not, as petitioner suggests (Br. 42-43) simply look

to the common-law meaning of "fraud." Rather, it looked to "the letter of the statute" and "the evil sought to be remedied." 161 U.S. at 313. In so doing, the Court concluded that it is "the intent and purpose" of the defendant, rather than the precise nature of the misrepresentation, that is central to the offense of mail fraud: "It was with the purpose of protecting the public against *all such intentional efforts to despoil*, and to prevent the post office from being used to carry them into effect, that this statute was passed." *Id.* at 313-314 (emphasis added).

Durland establishes that the mail fraud statute is not a codification of the common law of fraud or the crime of false pretenses. What is required under the mail fraud statute is not that someone actually be defrauded, but rather that the defendant use the mails in connection with a scheme that he has devised, or intends to devise, through which he *intends* to defraud someone.[18] See, *e.g.*, *United States* v. *Stewart*, 872 F.2d 957, 960 (10th Cir. 1989) ("It is well established * * * that an offense under § 1341, unlike common law fraud, does not require successful completion of the scheme to defraud."); *United States* v. *Groves*, 122 F.2d 87, 90 (2d Cir.) (argument that mail fraud statute cannot be "more extensive than the common-law action for deceit * * * must fail [because] * * * the statute is not limited to what would give rise to a civil action"), cert. denied, 314 U.S. 670 (1941); *United States* v. *Loring*, 91 F. 881, 887 (N.D. Ill. 1884) (Mail fraud "need not * * * be a fraud either at common law or by statute. It is enough if it was a scheme or purpose to defraud any persons of their money."); M. Taylor, *The Law of*

[18] As this Court has explained, the words "'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'" *McNally*, 483 U.S. at 358 (quoting *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)). The words also extend to schemes to defraud others of "the intangible right of honest services." 18 U.S.C. 1346.

Postal Frauds & Crimes 184 (1931) ("scheme" to defraud requires only "the formation of a plan, device, or trick to perpetrate a fraud on another," not actual obtaining of money or property by fraud).[19]

2. Thus, for example, one of the elements of common-law fraud and of false pretenses was reliance by the victim on the defendant's false representation. See *Smith*, 38 U.S. (13 Pet.) at 39; Restatement (Second) of Torts §§ 525, 531, 537 (1977); 1 J. Story, *Commentaries* §§ 191, 195, at 204, 220; 2 J. Bishop, *Commentaries on the Criminal Law* § 461, at 253-254 (5th ed. 1872). As petitioner concedes, however (Br. 36 n.18), reliance is not an element of mail fraud, wire fraud, or bank fraud.[20] See, *e.g.*, *United States* v. *Griffith*, 17 F.3d 865, 875 (6th Cir.) ("detrimental reliance is not one of the two elements of wire fraud"), cert. denied, 513 U.S. 850 (1994); *Stewart*, 872 F.2d at 960 ("[U]nder [the mail fraud statute,] * * * the government does not have to prove actual reliance upon the defendant's misrepresentations.").

[19] Because the mail fraud, wire fraud, and bank fraud statutes extend to "scheme[s] or artifice[s]" *intended* to defraud, and are not limited to completed frauds or the actual obtaining of money or property by false pretenses, petitioner's argument is not advanced by his citation (Br. 32-37) of numerous cases holding that materiality is required to make out the elements of the crime of false pretenses or of various common-law tort or contract doctrines sounding in fraud.

[20] Similarly, although a civil action for fraud could not succeed without proof of damage, the mail fraud, wire fraud, and bank fraud statutes impose no such requirement. Compare *United States* v. *Rowe*, 56 F.2d 747, 749 (2d Cir.) (L. Hand, J.) ("civilly, of course, the mail fraud statute would fail without proof of damages, but that has no application to criminal liability"), cert. denied, 286 U.S. 554 (1932), and *United States* v. *McKay*, 45 F. Supp. 1007, 1012 (E.D. Mich. 1942) ("at common law damage to the victim is an essential element * * * [b]ut under the Mail Fraud Statute a showing of loss to the victim is not in any way essential"), with 1 J. Story, *Commentaries* § 203, at 227 (victim of civil fraud "must have been misled to his prejudice or injury").

There is no more reason to impute a materiality requirement into the phrase "scheme or artifice to defraud" than there is to impute a requirement of reliance or damages. As *Durland* makes clear, the essence of mail fraud, wire fraud, and bank fraud is the intent to defraud, and a person thus cannot commit those crimes without at least *intending* that his fraudulent scheme cause the victim to part with money, property, or some other interest. There is no basis to impose the additional requirement that the scheme the defendant devised or intended to devise was objectively material, *i.e.*, in fact had "a natural tendency to influence, or [was] capable of influencing" the victim. *United States* v. *Gaudin*, 515 U.S. 506, 509 (1995).

3. Relying on an analogy to the law of criminal attempt, petitioner suggests (Br. 36 n.18) that a requirement of materiality should be read into the statutes at issue even though reliance concededly should not. Petitioner's analogy is misplaced. The mail fraud statute, for example, applies by its terms to those who "devise[] or intend[] to devise" a scheme or artifice to defraud, and who use the mails "for the purpose of executing such scheme or artifice or attempting to do so." 18 U.S.C. 1341. That language is fully applicable to a defendant who intends to defraud someone, and who uses the mails in an effort to advance his scheme, but whose scheme turns out in the particular circumstances to lack the natural tendency to influence, or the capability of influencing, the intended victim. Nothing in the language of the mail fraud provision requires that the defendant's scheme amount to attempted fraud or false pretenses. The scope of the provision in that respect therefore does not properly turn on principles derived from the law of criminal attempt.[21]

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[21] The wording of the wire fraud statute is identical in pertinent respects to that of the mail fraud statute. See 18 U.S.C. 1343. The bank fraud statute is worded slightly differently, see 18 U.S.C. 1344; see also note 16, *supra*, but its essential focus on the formation of a "scheme" is the same.

In any event, when a defendant intends to defraud another but devises a scheme that in the circumstances turns out to be immaterial to its intended victim, he is properly viewed as having attempted to commit fraud or false pretenses. It is no defense to a charge of criminal attempt that the means the defendant chose to commit the completed offense turned out in the circumstances to be inadequate. See, *e.g.*, Model Penal Code § 5.01 cmt. 3(a), at 311-312 (1985) (discussing, *inter alia*, case in which defendant attempted to kill using poison incapable of producing death). See generally *United States* v. *Hsu*, 155 F.3d 189, 202-203 & n.19 (3d Cir. 1998) (weight of federal authority follows Model Penal Code approach to principles of criminal attempt). Nor should it be a defense to a charge of attempted fraud that the defendant's deceptive scheme, though intended to defraud, turned out in the circumstances to be incapable of deceiving, or unimportant to, the intended victim. Cf. Model Penal Code § 5.01 cmt. 3(c), at 318 n.92 (defendant who sought to suborn perjury properly guilty of attempted subornation even if false testimony sought turned out to be immaterial; criticizing contrary view reflected in early state decision as resting on incorrect view that materiality is matter of law). Put differently, a defendant who intends to defraud but uses inadequately deceptive means is properly viewed as guilty of attempted fraud for the precise reason that petitioner identifies (Br. 36 n.18): if the scheme had worked as intended, the defendant would have defrauded his victim.

4. Although petitioner claims (Br. 45) that "during the critical period when the mail fraud statute was adopted and revised, the statute was understood by this Court and by the lower courts * * * to include the established element of materiality," that claim is incorrect.

Far from endorsing a materiality requirement, this Court in *Durland* held that the mail fraud statute extended beyond the common law of false pretenses, and was intended to protect against all "intentional efforts to despoil" through use of the mails. 161 U.S. at 313-314. And in the three cases in which it has listed the elements of mail fraud, the Court has never mentioned a requirement of materiality. See *Pereira*, 347 U.S. at 8; *Young*, 232 U.S. at 161; *Stokes*, 157 U.S. at 188-189.

The handful of lower-court cases cited by petitioner (Br. 42-45) are not to the contrary. Several make clear that material misrepresentations are sufficient to make out a mail fraud violation, but do not hold that materiality is required. See, *e.g.*, *Harris* v. *Rosenberger*, 145 F. 449, 453 (8th Cir. 1906). Others are ambiguous at best. See, *e.g.*, *Brooks* v. *United States*, 146 F. 223, 227 (8th Cir. 1906) (mail fraud statute contemplates "any scheme * * * provided only it was designed and reasonably adapted to deceive and defraud"; "[i]f the intent and purpose is to deceive and defraud the unwary, it matters not what form the project is made to take"). And others address issues distinct from materiality, notwithstanding petitioner's effort to recast them as cases that in essence impose a requirement of materiality. See, *e.g.*, *Harris*, 145 F. at 455 (addressing so-called "puffing" exception, discussed p. 46, *infra*). See also *United States* v. *Fay*, 83 F. 839, 839 (E.D. Mo. 1897) (cited in amicus American Council of Life Insurance, et al. (ACLI) Br. 29) (imposing requirement, discussed pp. 47-48, *infra*, that scheme be "reasonably adapted to deceive persons of ordinary prudence").

What is most noteworthy about the cases cited by petitioner is that not one of them expressly holds that materiality is an element of mail fraud. Petitioner's failure to locate even a single early case containing such an express holding is strong evidence that the mail fraud statute was not understood to impose such a requirement. In fact, the sole early

case we have located that expressly decided the question holds that materiality is not an element of mail fraud. *McCarthy* v. *United States*, 187 F. 117, 118 (2d Cir. 1911).[22] Thus, contrary to petitioner's assertion, the early history of the mail fraud statute refutes rather than supports the claim that materiality is an implied element of the mail fraud, wire fraud, and bank fraud statutes.

C. There Is No Persuasive Policy Justification For Imputing A Materiality Requirement To The Mail Fraud, Wire Fraud, And Bank Fraud Statutes

1. There is no persuasive policy justification for grafting a materiality requirement onto the mail fraud, wire fraud, and bank fraud statutes. Contrary to the contention of amicus ACLI (Br. 24-25), each of the statutes contains a distinctive intent requirement that effectively narrows the scope of deceptive conduct reached by the statute. The mail fraud and wire fraud statutes reach only "scheme[s] or artifice[s]" to "defraud" or to "obtain[] money or property" by deceptive means. 18 U.S.C. 1341, 1343. Similarly, the bank fraud statute punishes only "scheme[s] or artifice[s]" to

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[22] In *McCarthy*, the defendant requested an instruction that the jury was required to find "that material false and fraudulent representations are contained in the case." 187 F. at 118 (internal quotation marks omitted). The district court rejected the proposed instruction, explaining that the jury "must find that there was an intent to deceive, and unless the misrepresentations were material, amounted to something, it would be absurd to find that they were intended to deceive; but that is for the jury to say, rather than for me to charge." *Ibid.* (internal quotation marks omitted). The district court instead instructed the jury that the question it had to consider was whether "these defendants planned and intended, or tried to plan, a method by which they could use the mails * * * so these people would be deceived or misled into paying or sending money for some article of value to these defendants under ideas not justified by the facts as they actually existed." *Ibid.* The court of appeals affirmed, holding that the district court's instructions were "entirely in accord with *Durland* * * * and all that defendants were entitled to ask." *Ibid.*

"defraud a financial institution" or to "obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution" by deceptive means. 18 U.S.C. 1344. Those requirements limit the scope of the statutes to schemes that the defendant subjectively intends would defraud a victim, or would enable the defendant to obtain money or property from the victim by deceptive means. See generally *Durland*, 161 U.S. at 313 (under the mail fraud statute, "the significant fact is the [defendant's] intent and purpose"). A person who engages in deceptive conduct solely for a purpose other than to defraud or obtain money or property (*e.g.*, to keep a private matter confidential) would fall outside the scope of the statutes.[23]

The subjective intent required by the three provisions at issue would rarely exist (or be capable of being proven) when the deceptive conduct was trivial in character. *Cf. Wells*, 519 U.S. at 499 ("A statement made 'for the purpose of influencing' a bank will not usually be about something a banker would regard as trivial."); *Kungys* v. *United States*, 485 U.S. 759, 780-781 (1988) ("Obviously, it will be relatively rare that the Government will be able to prove that a misrepresentation that does not have a natural tendency to influence the decision regarding immigration or naturaliza-

[23] Amicus ACLI notes that the Department of Justice, in a report excerpted in the Congressional Record, suggested that materiality is an element of mail fraud. Br. 13 n.3 (citing 140 Cong. Rec. H10,773 (daily ed. Oct. 4, 1994)). The cited excerpt is focused principally on the point that a proposed bankruptcy fraud statute, patterned after the mail fraud and wire fraud statutes, would be narrow in scope because it would require "*proof beyond a reasonable doubt of a specific intent to defraud.*" *Ibid.* The passing reference to materiality in the excerpt contained no citation to authority, *ibid.*, and more careful analysis has led us to the contrary conclusion.

tion benefits was nonetheless made with the subjective intent of obtaining those benefits.").[24]

But there are sound reasons for Congress to criminalize the conduct proscribed by the mail fraud, wire fraud, and bank fraud statutes, without requiring full-blown proof, and a jury finding, on whether a particular scheme was "capable of influencing" the victim. *Gaudin*, 515 U.S. at 509 (defining materiality). The statutes at issue reflect the judgment that those persons who intentionally set out to deceive others to obtain money or property warrant punishment even if their deceptions turn out in a given instance to be poorly adapted to visiting actual harm upon the intended victim. See *Kungys*, 485 U.S. at 780. To deviate from the statutory text of the mail fraud, wire fraud, and bank fraud statutes by imposing an additional materiality requirement would therefore decriminalize a type of wrongdoing that Congress was entitled to deter and punish through criminal sanctions. As this Court explained in *Kay* v. *United States*, 303 U.S. 1, 5-6 (1938):

> It does not lie with one knowingly making false statements with intent to mislead * * * to say that the statements were not influential or the information not important. There can be no question that Congress was entitled to require that the information [provided to obtain a loan] be given in good faith and not falsely with intent to mislead.[25]

[24] Although amicus ACLI contends (Br. 7) that "[i]n *Kungys*, [485 U.S. at 780], the Court described the effect of removing the element of materiality as 'draconian,'" the Court in *Kungys* actually concluded that the absence of a materiality requirement "does *not* produce draconian results." 485 U.S. at 780 (emphasis added).

[25] See also, *e.g.*, Model Penal Code § 5.01 cmt. 3(b), at 316 n.88 (noting concern that defendant "who tries to commit a crime by what he later learns to be inadequate methods will recognize the futility of his course of action and seek more efficacious means").

2. Amicus ACLI objects (Br. 22) that the failure to impute a materiality requirement to the statutes at issue would criminalize "a wide range of innocuous acts." Amicus's concern is unwarranted.

Amicus ACLI first argues (Br. 25, 27-28; see also Pet. Br. 43-44) that a materiality requirement is necessary to ensure that "puffing" or "seller's talk" is not rendered criminal. This Court long ago left open the question whether the mail fraud statute applies to "[m]ere puffing," *i.e.*, "the mere exaggeration of the qualities" possessed by an article in commerce. *United States* v. *New South Farm & Home Co.*, 241 U.S. 64, 71 (1916). Although the courts adopting an exception for "puffing" have on occasion suggested that "puffing" is immaterial, see, *e.g.*, *Harris*, 145 F. at 455, the exception is far more often justified on other grounds.[26] The conclusion that the mail fraud, wire fraud, and bank fraud statutes contain no materiality requirement therefore does not necessarily imply that the "puffing" exception is invalid.

Amicus ACLI further contends (Br. 29-30) that a materiality requirement is necessary to prevent prosecution of defendants who make "implausible misrepresentations" that would deceive only a gullible victim. That is not an argument that favors adoption of a materiality requirement. Prosecutions of those who seek to defraud the naive or

[26] See, *e.g.*, *United States* v. *Gay*, 967 F.2d 322, 329 (9th Cir.) ("'Puffing' concerns expressions of opinion, as opposed to the knowingly false statements of fact which the law proscribes."), cert. denied, 506 U.S. 929 (1992); *United States* v. *Rabinowitz*, 327 F.2d 62, 80-81 (6th Cir. 1964) (reversing mail fraud conviction on ground that evidence showed "sales talk" and "exaggerations" but no "intent to deceive"); 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.7(b)(5), at 388-389 ("seller's talk" or "puffing wares" sometimes treated as "exaggerated expression of opinion" rather than "misrepresentation of fact which will qualify for false pretenses"); 2 J. Bishop, *Commentaries on the Criminal Law* § 454, at 248-249 (expressions of opinion about wares during bargaining do not amount to false pretenses).

gullible lie at the heart of both the crime of false pretenses and the mail fraud and wire fraud statutes: "Although at one time there was some authority that, for false pretenses, the lie had to be one calculated to deceive a reasonable man, the almost-universal modern rule is that the gullibility or carelessness of the defendant is no defense, since the criminal law aims to protect those who cannot protect themselves." 2 W. LaFave & A. Scott, *Substantive Criminal Law*, § 8.7(i)(1), at 403 (footnote omitted); 2 J. Bishop, *Criminal Law* § 433, at 355 (9th ed. 1923). See, *e.g.*, *United States* v. *Maxwell*, 920 F.2d 1028, 1036 (D.C. Cir. 1990) (under mail fraud statute, rejecting argument that "no fraudulent scheme existed because no reasonable person would have believed [the] misrepresentations"); *United States* v. *Brien*, 617 F.2d 299, 311 (1st Cir.) (same; citing cases), cert. denied, 446 U.S. 919 (1980); *O'Hara* v. *United States*, 129 F. 551, 555 (6th Cir. 1904) (under mail fraud statute, "[t]he objection that on its face the scheme was impossible of execution, and therefore should have deceived no one, is without merit"); M. Taylor, *The Law of Postal Fraud & Crimes* 189 (same). If a materiality requirement would tend to shift the focus from whether the defendant *intended* to defraud the victim to whether his actions would have had a natural tendency to defraud a reasonable and prudent victim, that consequence is one more reason to reject the imputed materiality element as inconsistent with the purposes of the federal fraud statutes.[27]

[27] Although the weight of authority supports the conclusion that it is no defense to a charge of mail fraud that the scheme at issue would not have deceived a reasonably prudent person, some courts of appeals have erroneously espoused the contrary view. See, *e.g.*, *United States* v. *Brown*, 79 F.3d 1550, 1558 (11th Cir. 1996). The disagreement among the courts of appeals, however, does not in reality involve a question of materiality, *i.e.*, whether a misrepresentation is important enough to influence another's actions. Rather, the disagreement is about whether the basic federal fraud offenses create a safe harbor for misrepresenta-

3. Amicus ACLI argues (Br. 6-7, 20; see also Pet. Br. 45-46), that the failure to require materiality under the mail fraud, wire fraud, and bank fraud statutes would draw into question case law holding that materiality is required under several other provisions. The cited provisions differ substantially from the mail fraud, wire fraud, and bank fraud statutes, however, and the conclusion that materiality is not an element of those statutes would not necessarily lead to a similar conclusion under different provisions. For example, 11 U.S.C. 523(a)(2)(A) requires proof of "actual fraud." And there is already a substantial body of case law from this Court addressing the distinctive issues of materiality that arise under the securities laws, including Rule 10b-5, which prohibits, in connection with the purchase of securities, "any device, scheme, or artifice to defraud," 17 C.F.R. 240.10b-5(a), *and* "any untrue statement of a *material* fact," 17 C.F.R. 240.10b-5(b) (emphasis added). See, *e.g.*, *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 230-241 (1988); *TSC Indus.* v. *Northway, Inc.*, 426 U.S. 438, 444-464 (1976); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 152-154 (1972).[28]

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tions, even those that concern relevant and significant matters and therefore are material, when they are insufficiently plausible to deceive a reasonably prudent person (or would be subject to refutation in the exercise of due diligence). Recognizing that criminals often focus their efforts to defraud on the most vulnerable victims, most courts have properly refused to recognize such a safe harbor.

[28] Nor is there merit to amicus ACLI's contention (Br. 18-21) that a materiality requirement must be read into the mail fraud, wire fraud, and bank fraud statutes in order to prevent undue imposition of civil liability under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* Because any injury suffered by a civil RICO plaintiff must be "by reason of" racketeering activity proscribed by 18 U.S.C. 1962 (see 18 U.S.C. 1964(c)), several courts of appeals require the plaintiff to prove reliance in a civil RICO action predicated on mail fraud, wire fraud, or bank fraud. See, *e.g.*, *Chisolm* v. *TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996) (in "decid[ing] * * * to impose a reliance requirement in the civil RICO context," court is "fully aware that no

4. Finally, neither the rule of lenity nor the Due Process Clause requires that an element of materiality be imputed to the mail fraud, bank fraud, and wire fraud statutes. The rule of lenity applies "only if, after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Wells*, 519 U.S. at 499 (internal quotations omitted). "Read straightforwardly, [the mail fraud, wire fraud, and bank fraud statutes] reveal[] no ambiguity, [and their] *mens rea* requirements narrow the sweep of the statute[s.] * * * [T]his is not a case of guesswork reaching out for lenity." *Ibid.*

There is also no merit to petitioner's due process argument. Br. 48-49. A reasonable person would certainly have fair notice that the mail fraud, wire fraud, and bank fraud statutes contain no materiality requirement, given the language of the statutes, which make no mention of materiality, and the decisions of this Court, which have repeatedly listed the elements of mail fraud without mentioning materiality. See *Pereira*, 347 U.S. at 8; *Young*, 232 U.S. at 161; *Stokes*, 157 U.S. at 188-189. See also *Durland*, 161 U.S. at 313-314.

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analogous rule exist[s] in criminal RICO prosecutions involving mail fraud"). Thus, the elements that are required in a civil RICO case may be distinct from the elements that are required in a criminal prosecution under a predicate statute.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 1999

Supreme Court, U.S.
FILED
FEB 3 1999
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(7)

No. 97-1985

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ELLIS E. NEDER, JR., PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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26 pp

TABLE OF CONTENTS

Page

I. THE REMOVAL OF AN ELEMENT FROM THE JURY'S CONSIDERATION CANNOT CONSTITUTIONALLY BE SUBJECT TO HARMLESS-ERROR REVIEW 3

A. The Harmless-Error Doctrine Is Inapplicable When The Jury Has Not Rendered A Verdict On Every Element Of The Offense Charged 3

B. Removal Of An Element Cannot Be Cured By An Appellate Court's Finding That The Element Was "Uncontested" Or "Incontrovertible." 7

C. Reversal Is Needed To Safeguard The Jury's Role As The Arbiter Of Guilt, And Would Not Have The Drastic Consequences Claimed By The Government . 11

II. MATERIALITY IS AN ELEMENT OF THE MAIL FRAUD, WIRE FRAUD, AND BANK FRAUD STATUTES 11

A. The Statutes' Plain Language Shows That Materiality Is An Element Of Mail, Wire, And Bank Fraud . . . 11

B. The Government's Effort To Redefine Fraud Must Be Rejected. 15

C. The Government Misreads *Durland* 16

D. The Government's Policy Arguments Are Unavailing 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

Arizona v. *Fulminante*, 499 U.S. 279 (1991) 8

Badaracco v. *Commissioner*, 464 U.S. 386 (1983) 18

Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988) 8

Basic, Inc. v. *Levinson*, 485 U.S. 224 (1988) 14

BMW of N. Am., Inc. v. *Gore*, 517 U.S. 559 (1996) 12

Brecht v. *Abrahamson*, 507 U.S. 619 (1933) 5

California v. *Roy*, 519 U.S. 2 (1996) 4, 7, 8, 9

Carella v. *California*, 491 U.S. 263 (1989) . . . . . *passim*

Carpenters & Joiners v. *United States*,
330 U.S. 395 (1947) 4

Chapman v. *California*, 386 U.S. 18 (1967) 7, 8

Chisholm v. *Transouth Fin. Corp.*, 95 F.3d 331
(4th Cir. 1996) 20

Community for Creative Non-Violence v. *Reid*,
490 U.S. 730 (1989) 12

Connecticut v. *Johnson*, 460 U.S. 73 (1983) 9, 10

Durland v. *United States*, 161 U.S. 306
(1896) 2, 16, 17, 18

TABLE OF AUTHORITIES — Continued

Page

Estelle v. *McGuire*, 502 U.S. 62 (1991) 10

Evans v. *United States*, 153 U.S. 584 (1894) 17

Fasulo v. *United States*, 272 U.S. 620 (1926) 15

Fedorenko v. *United States*, 449 U.S. 490 (1981) 14

Field v. *Mans*, 516 U.S. 59 (1995) 13

Johnson v. *United States*, 520 U.S. 461 (1997) 8, 11

Kay v. *United States*, 303 U.S. 1 (1938) 19

Kungys v. *United States*, 485 U.S. 759 (1988) 14, 19

Lorillard v. *Pons*, 434 U.S. 575 (1978) 12

Molzof v. *United States*, 502 U.S. 301 (1992) 2

Nationwide Mut. Ins. Co. v. *Darden*, 503 U.S. 318 (1992) . . . 12

NLRB v. *Amax Coal Co.* 453 U.S. 322 (1981) 13

Pope v. *Illinois*, 481 U.S. 497 (1987) 6

Rose v. *Clark*, 478 U.S. 570 (1986) 5, 10

Staples v. *United States*, 511 U.S. 600 (1990) 16

Sullivan v. *Louisiana*, 508 U.S. 275 (1993) . . . . . *passim*

United States v. *Gaudin*, 515 U.S. 506 (1995) 1, 4

TABLE OF AUTHORITIES — Continued

Page

United States v. *Ladish Malting Co.*, 135 F.3d 484 (7th Cir. 1998) 8

United States v. *Wells*, 519 U.S. 482 (1997) 12, 13, 14, 19

Vasquez v. *Hillery*, 474 U.S. 254 (1986) 8

Waller v. *Georgia*, 467 U.S. 39 (1984) 9

Wright v. *West*, 505 U.S. 277 (1992) 14

Yates v. *Evatt*, 500 U.S. 391 (1991) 3, 7

Statutes and Rules

18 U.S.C. § 1014 19

18 U.S.C. § 1341 1

18 U.S.C. § 1343 1

18 U.S.C. § 1344 1

18 U.S.C. § 1964(c) 20

21 U.S.C. § 843(a)(4)(A) 13

26 U.S.C. § 6700(a)(2)(A) 13

26 U.S.C. § 9803(a)(2) 14

29 U.S.C. § 1183(2) 14

TABLE OF AUTHORITIES — Continued

Page

Pub. L. No. 91-513, Title II, § 403, 84 Stat. 1263 (1970) 13

Pub. L. No. 97-248, Title III, § 320(a), 96 Stat. 611 (1982) 14

Fed. R. Crim. P. 52(a) 8

Fed. R. Crim. P. 52(b) 8

Miscellaneous

Br. of United States, *Rogers* v. *United States*, No. 96-1279 8

140 Cong. Rec. H10773 (daily ed. Oct. 4, 1994) 15

Model Penal Code § 5.01 (1985) 16

G. Williams, CRIMINAL LAW: THE GENERAL PART (2d ed. 1961) 16

REPLY BRIEF FOR PETITIONER

1. The government does not and cannot reconcile the Eleventh Circuit's harmless-error decision with *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) — in particular, *Sullivan*'s holding that "the entire premise of *Chapman* review is simply absent" where the jury renders an incomplete verdict because "[t]here is no *object*, so to speak, upon which harmless-error scrutiny can operate." *Id.* at 280 (emphasis in original). In fact, the government concedes (at 30-31) that *Sullivan*'s holding precludes harmless-error review where, as here, the jury has failed to find the defendant guilty of every element of the crime, and where the appellate court thus would be forced to speculate what the jury would have found had it considered the element. The government thus resorts to an assault on *Sullivan* itself, arguing (at 25-26) that *Sullivan* cannot mean what it says, and that its carefully delineated harmless-error framework should be tossed aside. The government's attack on *Sullivan* not only is ill-conceived, but actually underscores the fact that the government's position cannot be reconciled with this Court's constitutional harmless-error jurisprudence.

The government's answer to its dilemma is to posit a far-fetched and unprincipled exception to *Sullivan*, suggesting that harmless-error review applies where the trial court removes "only a single element of an offense." U.S. Br. 13. The *number* of elements removed, however, is meaningless. "The Constitution gives a criminal defendant the right to demand that a jury find him guilty of *all* the elements of the crime with which he is charged" *United States* v. *Gaudin*, 515 U.S. 506, 511 (1995) (emphasis added). The government's novel claim naturally raises the question why, if it is constitutionally permissible to affirm a conviction where the jury has not found one of the elements of the crime, that would not also be true if two or more elements were removed. The government offers no answer.

The government also claims that this case is special because the court of appeals found that the element removed was "uncontested." That finding, however, reflects nothing more than the Eleventh Circuit's subjective view of the evidence. Petitioner did not plead guilty. Nor did he stipulate to any element. In fact, he insisted that materiality be decided by the jury. It is true, as the government notes, that petitioner's closing argument did not focus on materiality, but that

was inevitable, as the summation occurred *after* the trial court's directed verdict on that element. Under such circumstances, no reviewing court could constitutionally find that materiality was "uncontested." Indeed, for a reviewing court to declare materiality "uncontested" would be tantamount to declaring its removal harmless on the ground that the evidence concerning the element was "overwhelming" — a result plainly forbidden by *Sullivan*. Whether an error is amenable to harmless-error scrutiny has nothing to do with the strength of the *evidence*. It depends entirely on the nature of the *error*. A structural error is "not curable by overwhelming record evidence of guilt." *Carella* v. *California*, 491 U.S. 263, 270 (1989) (Scalia, J., concurring). In this case, the trial court's removal of materiality from the jury's consideration unquestionably qualifies as a structural error that defies harmless-error scrutiny.

2. Our opening brief demonstrated that materiality is an element of the federal mail, wire, and bank fraud statutes, 18 U.S.C. §§ 1341, 1343, 1344. Each statute prohibits a "scheme or artifice to defraud." It also is undisputed that the settled common-law meaning of the term "defraud" includes a materiality requirement. Thus, by using that term, Congress incorporated that materiality element into the mail, wire and bank fraud statutes based upon the "cardinal rule of statutory construction" that statutory language is presumed to carry its common-law meaning. Pet. Br. 30-35; *Molzof* v. *United States*, 502 U.S. 301, 307 (1992).

The government does not offer any evidence (and there is none, see Pet. Br. 35-48) of a contrary congressional intent that would rebut the presumption that the word "defraud" bears its normal common-law meaning —including the materiality requirement — in the mail, wire, and bank fraud statutes. Instead, the government invites this Court to abandon the canon of construction and to hold instead that common-law terms bear their common-law meaning only if additional textual evidence indicates that Congress actually meant to "codify" a common-law action. The government's invitation is both unprecedented and ill-conceived. The government also misreads *Durland* v. *United States*, 161 U.S. 306 (1896), as having resolved the question presented (which it plainly did not). And in the end, the

government tries to rewrite these statutes based on policy justifications that Congress never articulated. None of the government's arguments succeeds in overcoming the plain meaning of the mail, wire, and bank fraud statutes, which by using the term "defraud" undeniably require proof of a material falsehood.

I. THE REMOVAL OF AN ELEMENT FROM THE JURY'S CONSIDERATION CANNOT CONSTITUTIONALLY BE SUBJECT TO HARMLESS-ERROR REVIEW.

A. The Harmless-Error Doctrine Is Inapplicable When The Jury Has Not Rendered A Verdict On Every Element Of The Offense Charged.

In *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), and *Yates* v. *Evatt*, 500 U.S. 391 (1991), this Court carefully delineated the constitutional limits of harmless-error review. In each case, the Court emphasized that "[h]armless-error review looks * * * to the basis on which the jury actually rested its verdict.' * * * That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury trial guarantee." 508 U.S. at 279 (quoting *Yates*, 500 U.S. at 404). As the government acknowledges, under *Sullivan* "it is never appropriate to determine what a jury would necessarily have found in the absence of an error, as distinguished from what the jury actually did find despite that error." U.S. Br. 25. The government also concedes that "[a] logical extension of that reasoning would mean that harmless-error review in light of the record evidence is virtually impossible when the jury instructions entirely omit an element, because the jury instructions would not have authorized consideration of the evidence, insofar as it was relevant to that element at all." *Id.* at 26.

Unable to reconcile the Eleventh Circuit's harmless-error holding with *Sullivan*, the government takes the only course it can to preserve petitioner's tax fraud conviction: asking the Court to transform the harmless-error doctrine and allow appellate courts to uphold a conviction rendered on an incomplete guilty verdict so long as the jury instructions remove "only a single element of an offense." U.S.

Br. 13. The government simplistically reasons that because "this Court has refused to apply a rule of automatic reversal" to other instructional errors involving single elements (U.S. Br. 14), the complete omission of a single element *also* must be subject to harmless-error review. The government's analysis, however, entirely ignores *why* the Court found these particular "single-element" errors subject to harmless-error review. The Court's holdings in those cases had nothing to do with the *number* of elements at issue. Rather, it was the *nature* of the instructional error that allowed for harmless-error review.

A constitutionally incomplete verdict is a constitutionally incomplete verdict, regardless of whether it arises from the omission of one, two or three elements. *Gaudin* itself was a "one element" case. So was *Carpenters & Joiners* v. *United States*, 330 U.S. 395 (1947) (whose holding was reaffirmed in *Sullivan*). Yet nowhere did the Court suggest that the constitutional error in either case was somehow mitigated by the fact that it concerned "only one element." To the contrary, this Court reaffirmed the Constitution's requirement that a guilty verdict "rest upon a jury determination that the defendant is guilty of *every* element of the crime with which he is charged, beyond a reasonable doubt." *Gaudin*, 515 U.S. at 510 (emphasis added).

Apart from finding no support in this Court's precedents, the government's "one element" exception is wholly unprincipled. If the removal of a single element is susceptible to harmless-error review, why not two elements, or even three? The government never answers this obvious question, except to offers that its proposed exception would not apply if the trial court omits an "outcome determinative" element of the crime charged. U.S. Br. 17-18. But such a distinction is untenable. *Every* element is "outcome-determinative," since "[a] jury verdict that [the defendant] is guilty of the crime means, of course, a verdict that he is guilty of *each necessary element* of the crime." *California* v. *Roy*, 519 U.S. 2, 7 (1996) (Scalia, J., concurring) (emphasis in original).[1] If the jury has not found every

[1] The government claims that this Court's *per curiam* opinion in *Roy* "applied the same approach" to harmless-error review as *Pope* and *Rose*. U.S. Br. 15. Not so. *Roy* was a habeas corpus case in which the defendant failed to object to the instructional error at trial. The whole point of this Court's *per curiam* opinion (519 U.S. at 5), was that the *Chapman* harmless-error framework does not *apply* to habeas corpus cases, and that in such cases, courts must instead apply the stricter harmless-error test articulated in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993). Moreover, "[n]o one claim[ed in *Roy*] that the error at issue [was] of the 'structural' sort that 'def[ies] analysis by "harmless error" standards.'" 519 U.S. at 5.

element beyond a reasonable doubt, "there [is] no jury verdict within the meaning of the Sixth Amendment," and "[t]here is no *object*, so to speak, upon which the harmless-error scrutiny can operate." *Sullivan*, 508 U.S. at 280 (emphasis in original).

Unable to avoid *Sullivan*'s holding, the government ultimately resorts (at 27) to an attack on *Sullivan* itself, arguing that it conflicts with "a substantial body of contrary authority from this Court" that supposedly permits appellate courts to declare errors "harmless" based on speculation as to what the jury would have found absent the error. Indeed, the government even goes so far as to argue that *Sullivan* was wrong to prohibit such appellate speculation because a "reviewing court must determine how a reasonable jury *would have* rendered its verdict absent error" in order to engage in harmless-error review. U.S. Br. 28 (emphasis in original). The government cites nothing, however, to bolster its assault on *Sullivan*. And none of this Court's harmless-error decisions has *ever* permitted the sort of appellate conjecture over hypothetical jury verdicts advocated by respondent.

As *Sullivan* itself explained (508 U.S. at 280-281), the cases relied on by the government lend no support to its position because they *all* involved circumstances in which a *complete* verdict was entered by the jury on *all* elements, and it thus was possible for an appellate court to declare the error harmless on the ground that the jury's *actual findings* established the defendant's guilt beyond a reasonable doubt.[2] For instance, in *Rose* v. *Clark*, 478 U.S. 570, 579

[2] The government tries to distinguish *Sullivan* on the ground that the error here did not "vitiate[] *all* the jury's findings," U.S. Br. 22 (emphasis in original). If anything, however, the error here represents an even clearer

(1986) (a defective presumption case), this Court held that harmless-error review was permissible because the jury still "had to find [the defendant] guilty beyond a reasonable doubt as to every element" of the offense charged. The error could be harmless only because "the jury still was required to find the predicate facts to establish the element of malice beyond a reasonable doubt." *Sullivan*, 508 U.S. at 280-281 (quoting *Rose*, 478 U.S. at 580). Accord *Pope* v. *Illinois*, 481 U.S. 497, 503 (1987) ("The error in *Rose* did not entirely preclude the jury from considering the element of malice"); *Carella*, 491 U.S. at 273 (Scalia, J., concurring) (same).[3]

Likewise, the error in *Pope* (a misdescription case) was subject to harmless-error review because the jury's findings were "functionally equivalent" to a finding of the actual element: "no rational juror could plausibly have found the magazines utterly lacking in value under a community standard and come to a different conclusion under a reasonable person standard." *Carella*, 491 U.S. at 270 (Scalia, J., concurring).[4] Here, that plainly did not occur. As the government

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example of structural error than *Sullivan*. As Chief Justice Rehnquist noted in *Sullivan*, one could debate whether the error in *Sullivan* was structural because it did not "remove[] an element of the offense from the jury's consideration or prevent[] the jury from considering certain evidence." 508 U.S. at 283-284 (concurring opinion). Here, however, the trial court's error *did* entirely remove an element from the jury's consideration.

[3] Despite its concession that materiality was never considered by the jury "at all," the government absurdly suggests (at 16) that the error involved only a "misdescription." While the line between misdescriptions and omissions may sometimes be difficult to discern, there is no such problem here. This is not a case like *Pope* in which the jury was instructed to consider an element using an erroneous definition. Instead, the jury was expressly told not to consider the element at all. J.A. 249-256. That is hardly a "misdescription."

[4] The government obliquely suggests (at 31 n.14) that the jury's findings below were "functionally equivalent" to a finding of materiality. But as this Court explained in *Sullivan*, functional equivalence occurs only where the jury *actually finds* the omitted element through other elements or charges.

admits, "the jury here did not deliberate on the materiality element at all, while the jury in [*Rose* and *Pope*] did deliberate on the element at issue, albeit under inadequate instructions." U.S. Br. 30-31.

In short, contrary to the government's submission, this Court's harmless-error decisions have never permitted, much less required, appellate speculation regarding what a jury would have found in the absence of the error. As this Court made clear in *Sullivan* and *Yates*, an error is subject to harmless-error review only if the jury's *actual findings* established the defendant's guilt notwithstanding the error. Thus, where, as here, an element is removed from the jury's purview, the error "can be harmless only if the jury's verdict on other points effectively embraces [the element] or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well." *Roy*, 519 U.S. at 7 (Scalia, J., concurring) (emphasis in original). Here, however, the jury did not make *any* findings concerning the materiality element of the tax fraud charge. Petitioner's tax fraud conviction must therefore be reversed.

B. Removal Of An Element Cannot Be Cured By An Appellate Court's Finding That The Element Was "Uncontested" Or "Incontrovertible."

The government urges this Court to hold that removal of an element can be declared harmless if the appellate court determines beyond a reasonable doubt that the element was "uncontroverted and established by overwhelming proof." U.S. Br. 25. This position is both unprecedented and untenable. Indeed, the government's "test" entirely skips over the first part of *Chapman's* harmless-error inquiry. Whether an element is "uncontested" or "incontrovertible" bears only on the second prong of *Chapman*'s inquiry, *i.e.*, whether the error was harmless — not whether it is subject to harmless-error review in the

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508 U.S. at 281. In this case, by contrast, the government concedes (at 30-31) that the jury never considered materiality "at all," and that none of the other elements or charges required it to make the finding of materiality. While the government may argue that the alleged failure to report income is material, the inescapable fact remains that the jury never considered that issue.

first place. The government would have the Court do away with the first *Chapman* step, and thus declare that any error which is "harmless" based on the evidence must, *ipso facto*, be amenable to harmless-error scrutiny. As *Sullivan* made clear, however, the availability of harmless-error review has nothing do with the evidence.

The government conceded last Term in *Rogers v. United States*, No. 96-1279, that the first question in any harmless-error case is whether the error is "amenable to harmless-error review at all." Br. of United States, at 15.[5] Accord *Chapman* v. *California*, 386 U.S. 18, 20 (1967). Only if the harmless-error doctrine can constitutionally be applied may the appellate court then address whether the error actually was harmless. *Sullivan*, 508 U.S. at 280. Whether an error is of the "structural" sort that "def[ies] analysis by 'harmless-error' standards" (*Arizona* v. *Fulminante*, 499 U.S. 279, 307-309 (1991)), has *nothing* to do with the evidence. A "structural" error, by definition, "require[s] reversal without regard to the evidence in the particular case." *Rose*, 478 U.S. at 577. For example, when a jury is constituted in a racially discriminatory fashion (see *Vasquez* v. *Hillery*, 474 U.S.

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[5] Citing *Johnson* v. *United States*, 520 U.S. 461 (1997), and *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988), the government claims (at 11) that all constitutional errors are subject to harmless-error review under Fed. R. Crim. P. 52(a). Neither case supports that proposition. *Nova Scotia* merely held that, *when applicable*, a reviewing court cannot refuse to engage in harmless-error review. Whether the error below is subject to harmless-error review, however, is purely a function of constitutional "principles [that] necessarily circumscribe the availability of harmless-error analysis." *Carella*, 491 U.S. at 269 (Scalia, J., concurring). The government's reliance on *Johnson* also is misplaced. *Johnson* was a plain error case in which this Court held that the defendant had forfeited her constitutional right to a jury determination of the omitted element under Rule 52(b) by failing to preserve the error for appeal. In any event, the government's reliance on Rule 52(a) is unavailing since, under *Sullivan*, the right to a jury determination on every element of the offense plainly is a "substantial right[]" that may not be disregarded under Rule 52(a). See *Roy*, 519 U.S. at 7 (Scalia, J., concurring). See also *United States* v. *Ladish Malting Co.*, 135 F.3d 484, 490 (7th Cir. 1998) (Easterbrook, J.).

254 (1986)), or a defendant is denied a public trial (see *Waller* v. *Georgia*, 467 U.S. 39 (1984)), it makes no difference that an appellate court may believe the evidence of guilt is "overwhelming." Such errors are structural, and hence not susceptible to harmless-error review, "no matter how overwhelming the evidence." *Sullivan*, 508 U.S. at 277. That is why a trial court "may not direct a verdict for the State, no matter how overwhelming the evidence." *Ibid.*[6]

Where, as here, the jury has not found the defendant guilty of every element of the offense charged, the error is "structural," and thus immune from harmless-error scrutiny regardless of the evidence. There is nothing an appellate court can do to alter the fact that "the wrong entity judge[d] the defendant guilty." *Sullivan*, 508 U.S. at 281. No amount of evidence can show that the jury found what it never considered — or, as in this case, was instructed *not* to find.

The government's self-serving (and incorrect, see Pet. Supp. C.A. Br. 23-29) assertion (at 25) that the jury's "verdict would surely not have been different if the jury had been required to make a finding on materiality" is beside the point. "The absence of a formal verdict on [an element] cannot be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise." *Roy*, 519 U.S. at 7 (Scalia, J., concurring). "There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless." *Sullivan*, 508 U.S. at 280. Where, as in this case, the trial court directs a verdict on an element, and instructs the jury not to consider it, the evidence pertaining to that element becomes meaningless,

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[6] The government tries to deny (at 21) that the trial court's removal of materiality from the jury's consideration, and its own explicit finding of materiality, constituted a directed verdict. As Justice Powell explained, however, "[a] directed verdict *removes an issue* completely from the jury's consideration" and "permits a jury to convict a defendant 'without ever examining the evidence concerning an element of the crimes charged.'" *Connecticut* v. *Johnson*, 460 U.S. 73, 95-96 (1983) (dissenting opinion) (emphasis added). That is exactly what occurred here.

> [f]or nothing in the instruction would have directed the jury, or even permitted it, to consider and apply [the evidence concerning that element] in reaching its verdict. And the problem would not be cured by an appellate court's determination that the record evidence unmistakably established guilt, for that would represent a finding of fact by judges, not by a jury.

Carella, 491 U.S. at 269 (Scalia, J., concurring) (citing *Rose*, 478 U.S. at 578).

The government's proposal also rests upon the false assumption that an appellate court can constitutionally declare an element "uncontested" despite the defendant's not-guilty plea and specific request that the jury be instructed to consider that element. Any such finding by an appellate court would itself be unconstitutional. "In the federal courts, '[a] simple plea of not guilty * * * puts the prosecution to its proof as to all elements of the crime charged.'" *Estelle* v. *McGuire*, 502 U.S. 62, 69-70 (1991) (citation omitted). Thus, "a defendant in a criminal trial is justified, of course, in defending solely in reliance on the presumption of his innocence and the State's burden of proof." *Connecticut* v. *Johnson*, 460 U.S. 73, 87 n.16 (1983) (plurality opinion). The government's view would make a mockery of these bedrock constitutional principles, granting appellate courts the unfettered power to declare "uncontested" any element that a defendant fails to defend to the appellate court's satisfaction. Indeed, how is a reviewing court even to judge whether an element is "uncontested"? Here, for instance, the government relies on the content of petitioner's closing argument. U.S. Br. 5. But by the time closing arguments were delivered, the trial court already taken materiality away from the jury. It would therefore have been pointless — indeed, objectionable — for defense counsel to have argued about materiality to the jury. In short, removal of an element from the jury's consideration cannot constitutionally be cured by an appellate court's finding that the element was "uncontested" or "incontestible."

C. Reversal Is Needed To Safeguard The Jury's Role As The Arbiter Of Guilt, And Would Not Have The Drastic Consequences Claimed By The Government.

The government also claims that reversal of petitioner's tax fraud conviction would have "sweeping consequences for this Court's jurisprudence," and would "mandate reversal for virtually any error in defining the elements of the offense." U.S. Br. 31-32. That is simply not true. Reversal would only be required if the jury's other findings are not "functionally equivalent" to a finding on the element in question. *Sullivan*, 508 U.S. at 281. Moreover, under *Johnson* v. *United States*, 520 U.S. 461 (1997), removal of an element would require reversal only in the rare circumstance when the defendant timely objects to the instructional error and the trial court nonetheless erroneously refuses to instruct the jury to consider that element.

The government also is wrong in arguing (at 32) that reversal of petitioner's tax fraud conviction "serves no sufficient purpose." Quite the contrary, reversal is necessary to safeguard the constitutional right to a jury trial itself. As this Court explained in *Sullivan*, 508 U.S. at 277, that right "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of guilt." The government, however, advocates the unprecedented step of allowing appellate judges to become finders of fact on elements that the jury never was permitted to consider. To cross that line, however, would irreversibly impair the right to a jury trial. Far from promoting public disrespect for the judicial system, reversal of petitioner's tax fraud conviction and a new trial would reassure the public of the jury's continuing role as the exclusive arbiter of guilt or innocence in our constitutional system of justice.

II. MATERIALITY IS AN ELEMENT OF THE MAIL FRAUD, WIRE FRAUD, AND BANK FRAUD STATUTES.

A. The Statutes' Plain Language Shows That Materiality Is An Element Of Mail, Wire, And Bank Fraud.

1. In our opening brief, we showed that the plain language of the mail, wire, and bank fraud statutes includes materiality as an element of those crimes. Each statute prohibits a "scheme or artifice

to defraud." It also is undisputed that the term "defraud" has always had a fixed common-law meaning that includes materiality. Pet. Br. 33-35. See, *e.g.*, *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 579 (1996). Thus, because the Court "presume[s] that Congress incorporates the common-law meaning of the terms it uses if those terms * * * have accumulated settled meaning under * * * the common law," the mail, wire, and bank fraud statutes must be read to require materiality absent evidence of a contrary congressional intent. *United States* v. *Wells*, 519 U.S. 482, 491 (1997); Pet. Br. 32-33. There is no evidence, however, to rebut the presumption that the mail, wire, and bank fraud statutes require proof of materiality. In fact, the historical antecedents of these crimes, legislative history, early case law, and surrounding statutory language all reinforce the presumption. Pet. Br. 35-47.

The government concedes that common-law fraud requires proof of materiality, and that "courts generally 'presume that Congress incorporates the common-law meaning of the terms it uses.'" U.S. Br. 36-37. The government, however, posits that the word "defraud" would bear its common-law meaning in the mail, wire, and bank fraud statutes only if the statutes "indicated that Congress had codified the crime of false pretenses or one of the common-law torts sounding in fraud." U.S. Br. 37. The government thus would have this Court abandon the very canon of construction that it recently sought to enforce in *Wells*.

Application of the canon that statutory language is presumed to carry its common-law meaning to a particular statute does not depend on a manifest congressional intent to "codify" a common-law action. For example, in *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739-740 (1989), and *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 322-323 (1992), this Court relied on the canon to find that the term "employee" in the Copyright Act and ERISA incorporated traditional agency law principles. These holdings did not rest on findings that the statutes were intended to "codify" common-law principles. See also, *e.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 583 (1978) (applying the canon to the term "legal * * * relief" in the ADEA, without finding that Congress "codified" common-law

principles). Rather, the canon is triggered *any time* "Congress uses terms that have accumulated settled meaning under * * * the common law." *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981).

The government's demand for additional textual evidence that Congress meant to incorporate the elements of common-law fraud demonstrates a basic misunderstanding of the canon. The canon requires courts to "*presume* that Congress incorporates the common-law meaning of the terms it uses." *Wells*, 519 U.S. at 491 (emphasis added). That presumption would not be a *presumption* if *additional* textual indications were required — beyond the use of language with a settled common-law meaning — of Congress's intent to incorporate the common-law meaning of the words it uses. Whenever Congress uses common-law terms like "defraud," "they imply elements that the common law has defined them to include. Congress could have enumerated their elements, but Congress's contrary drafting choice did not deprive them of a significance richer than the bare statement of their terms." *Field* v. *Mans*, 516 U.S. 59, 69 (1995).

Thus, the government misses the point by stressing that the mail, wire, and bank fraud statutes do not include the word "material." U.S. Br. 34, 49. The term "defraud" brings with it the common-law requirement of materiality. For that same reason, the government's observation (at 35-36, 49), that this Court has enumerated the elements of mail fraud using the word "defraud," but not the word "material" merely begs the question.

2. The government seizes upon statutes that use the words "material" and "fraudulent" in the same sentence, as supposed evidence that the statutes at issue here do not require proof of materiality. U.S. Br. 34 (citing 21 U.S.C. § 843(a)(4)(A) ("false or fraudulent material information"); 26 U.S.C. § 6700(a)(2)(A) ("statement" that is "false or fraudulent as to any material matter")). The existence of these statutes does not bolster the government's case.

The statutes cited by the government were enacted in 1970 and 1982 — a century *after* Congress' 1872 enactment of the original mail fraud statute and its use of the phrase "scheme or artifice to defraud." Pet. Br. 30-31 & nn.12-13. See also Pub. L. No. 91-513, Title II,

§ 403, 84 Stat. 1263 (1970) (21 U.S.C. § 843); Pub. L. No. 97-248, Title III, § 320(a), 96 Stat. 611 (1982) (26 U.S.C. § 6700). Subsequently enacted statutes have no bearing on Congress's meaning in 1872. See, *e.g.*, *Wright* v. *West*, 505 U.S. 277, 295 n.9 (1992) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one").

Moreover, even if they were relevant, the statutes cited by respondent would lend no support to its position. Both statutes precede the word "material" with the phrase "*false or* fraudulent." Because a "false" statement or "false" information need not be material (*Wells*, 519 U.S. at 490-491), the word "material" is necessary to limit the statutes' scope to material falsehoods. The government has not cited a single statute, and we are aware of none, that speaks solely of "material fraud." *All* frauds require a material falsehood. Other statutes, not cited by the government, make this clear. See 26 U.S.C. § 9803(a)(2) (referring to "fraud or *other* intentional misrepresentation of material fact") (emphasis added); 29 U.S.C. § 1183(2) (same).

3. If the government's view were adopted, materiality could *never* be an element of any statute that did not use the word "material." But in *Fedorenko* v. *United States*, 449 U.S. 490, 507 (1981), both the government and this Court agreed that a statute prohibiting certain "misrepresentation[s]," "only applie[d] to willful misrepresentations about 'material' facts" even though the statute did not use the word "material." Accord *Kungys* v. *United States*, 485 U.S. 759, 781 (1988) (the term "misrepresentation" is "commonly associated" with a materiality requirement, and implies a materiality element "in many contexts," including at common law). Similarly, as explained in our opening brief, this Court has long assumed that various provisions of the securities laws that do not use the word "material" include a materiality element. Pet. Br. 45-46. See, *e.g.*, *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 232 (1988). The government makes no attempt to reconcile those decisions with its position here, other than to offer the meaningless observation that "there is already a substantial body of case law from this Court addressing" the materiality requirement under the securities laws. U.S. Br. 48. In fact, as the government concedes (at 44 n.23), until it filed its brief in this

case, even the Department of Justice believed that the mail fraud statute required proof of materiality, and had told Congress that "while not in the statutory language, 'materiality' is an element of bankruptcy fraud," just as it is an element of mail fraud. 140 Cong. Rec. H10773 (daily ed. Oct. 4, 1994).

B. The Government's Effort To Redefine Fraud Must Be Rejected.

1. The government claims that because the mail, wire, and bank fraud statutes do not require the government to prove reliance or damage (two elements of common-law fraud), prosecutors need not prove materiality. U.S. Br. 39-40. This argument rests on a misapprehension of the conduct that the statutes are meant to punish. The statutes do not address fraud itself, but rather *schemes* to defraud.

A scheme to defraud can exist before the fraud itself is carried out. But because the scheme must be one to "defraud," it must have as one of its ingredients a material falsehood. Without that element, it simply is not a scheme to "defraud." *Cf. Fasulo* v. *United States*, 272 U.S. 620, 629 (1926) (overturning mail fraud conviction because "the attempt was by intimidation and not by anything in the nature of deceit or fraud as known to the law or as generally understood").

Arguing that the falsehood associated with the scheme need not be material, the government divorces the mail, wire and bank fraud statutes from the concept of fraud entirely. The government's reading would expand the statutes to cover *any* sort of scheme. Indeed, if the word "defraud" does not restrict the statutes to schemes that involve material falsehoods, then "[t]here is no more reason" (U.S. Br. 39) to restrict the statutes to schemes involving falsehoods at all, or even to schemes involving the deprivation of property or services.

2. The government further confuses matters when it argues that the statutes punish a failed attempt to defraud because the defendant used a falsehood that "in the circumstances turns out to be immaterial to its intended victim." U.S. Br. 41. Because the persuasive power of the falsehood — its materiality — is a necessary element of "fraud," one who attempts to deprive another of property through a

course of conduct without a material falsehood is not engaged in a "scheme or artifice to defraud."

Thus, the government's analogy to an "impossible" attempted murder is misguided. See U.S. Br. 41. The means used to commit murder are irrelevant to whether the crime has been committed, and an attempted intentional killing by ineffective means is, therefore, still attempted murder. But the same is not true for fraud. An intentional deprivation of property is fraud only if it is accomplished by means of a material falsehood. One who succeeds in depriving another of property with an immaterial falsehood has not committed fraud. And, for the same reason, one who unsuccessfully attempts to deprive another of property by means of an immaterial falsehood has not attempted fraud.

3. Finally, the government attempts to recharacterize the mail fraud statute as punishing anyone "who intends to defraud someone, and who uses the mails in an effort to advance his scheme," whether or not the scheme involves material falsehoods. U.S. Br. 40. But, as noted above, the government misses the point. One who intends to undertake a course of conduct that does not involve a material falsehood does not intend to "defraud," just as one cannot intend murder without intending to kill the victim.[7]

C. The Government Misreads *Durland*.

The government's brief reflects a fundamental misunderstanding of this Court's decision in *Durland* v. *United States*, 161 U.S. 306 (1896). *Durland* held that a scheme to defraud can be premised on false and fraudulent promises, just as it can on any other type of

[7] As the Model Penal Code explains, when considering criminal attempt, it is not the defendant's subjective intent or beliefs that conrol, but rather whether the defendant's intended conduct actually fits the legal definition of the crime. Otherwise, "the law of attempt would be used to manufacture a new crime, when the legislature has left the situation outside the ambit of the law." Model Penal Code § 5.01 cmt. 3(c), at 318 (1985) (quoting G. Williams, CRIMINAL LAW: THE GENERAL PART 634 (2d ed. 1961)). See also *Staples* v. *United States*, 511 U.S. 600, 604 (1990).

misrepresentation. The government mistakenly invokes *Durland* for the proposition that the term "defraud," as used in the mail fraud statute, is broader than common-law fraud. U.S. Br. 37-38, 42. However, as explained in our opening brief (at 42-43), *Durland* never suggested that the statute encompassed more than common-law fraud. To the contrary, the *reason* why phony promises were found to violate the statute was precisely because they constituted "fraud" as that term was generally understood:

> The statute is broader than is claimed. Its letter shows this: "Any scheme or artifice to defraud." Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud. Punishment because of the fraudulent purpose is no new thing.

161 U.S. at 313. The *Durland* Court underscored the lack of novelty in its approach, explaining that "an intent to cheat the vendor * * * is a plain fraud, and made punishable as such by statutes in many of the states." *Ibid.* (quoting *Evans* v. *United States*, 153 U.S. 584, 592 (1894)). See also Pet. Br. 43 n.24 (explaining that common-law fraud reached false promises). Contrary to what the government would have this Court believe, *Durland* made no break with the common law.

Noting that the *Durland* court "looked to 'the letter of the statute' and 'the evil sought to be remedied,'" the government claims that "[i]n so doing, the Court concluded that it is 'the intent and purpose' of the defendant, rather than the precise nature of the misrepresentation, that is central to the offense of mail fraud." U.S. Br. 38. Crucially, however, the government omits what the Court actually said about "the evil sought to be remedied":

> [B]eyond the letter of the statute is the evil sought to be remedied * * *. It is common knowledge that nothing is more alluring than the expectation of receiving large returns on small investments. * * * [A]ny scheme or plan which holds out the prospect of receiving more than is parted with appeals to the cupidity of all.

161 U.S. at 313. The "evil sought to be remedied" by the mail fraud statute was not free-floating intent or immaterial falsehoods. It was, as the Court made clear, the proliferation of deceitful schemes that had a natural tendency to induce detrimental action by their victims — *i.e.*, schemes involving material falsehoods. See also Pet. Br. 43.[8]

The government thus is only half right in stating (at 38) that "*Durland* establishes that the mail fraud statute is not a codification of the common law of fraud or the crime of false pretenses." While *Durland* surely held that the statute extends beyond the crime of false pretenses, it certainly did *not* establish that the term "defraud" in the mail fraud statute was broader than common-law fraud.

D. The Government's Policy Arguments Are Unavailing.

The government devotes much attention to policy arguments about why materiality should not be an element of the mail, wire, and bank fraud statutes. U.S. Br. 43-50. But "[c]ourts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement." *Badaracco* v. *Commissioner*, 464 U.S. 386, 398 (1983). Even if they were relevant to the Court's inquiry, however, the government's policy arguments are uniformly unpersuasive.

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[8] The government further misinterprets *Durland* by claiming that "*Durland* held that the mail fraud statute * * * was intended to protect against all 'intentional efforts to despoil' through use of the mails." U.S. Br. 42. In fact, *Durland* stated that the statute was enacted "protect[] the public against all *such* intentional efforts to despoil." The word "such," which the government omits, is significant. It refers to a description of the defendant's scheme: "The charge is that * * * it was not the intent of the defendant to make an honest effort for its success, but that he *resorted to this form and pretense of a bond without a thought that he or the company would ever make good its promises.*" 161 U.S. at 314 (emphasis added). Thus, the language relied upon by the government specifically referred to an "intentional effort[] to despoil" that involved both materiality and intent: a pretense of a legitimate instrument and an intent to make off with investors' money. *Durland* does not support the government's conclusion that the statute was aimed at "*all* 'intentional efforts to despoil.'" U.S. Br. 42 (emphasis added).

1. The government insists that there are "sound reasons" for criminalizing immaterial falsehoods. U.S. Br. 45. Yet the government fails to identify any such reasons. All the government shows is that Congress would be "entitled" to pass statutes covering immaterial falsehoods. *Ibid.* But that goes without saying. See *Wells*, 519 U.S. at 489-499 (Congress did not make materiality an element of 18 U.S.C. § 1014). In the mail, wire, and bank fraud statutes, however, Congress chose language that reflects its judgment to forbid only schemes to "defraud" — *i.e.*, schemes involving material falsehoods.[9]

The government also contends that a materiality requirement would make little practical difference because the requisite "subjective intent * * * would rarely exist (or be capable of being proven) when the deceptive conduct was trivial in character." U.S. Br. 44. The government thus would have the Court believe that common-law materiality has never served any real purpose. This unsupported empirical claim cannot stand in the face of the common law's historic persistence in requiring proof of materiality to prevent unwarranted civil or criminal liability based on trivial, irrelevant, or implausible falsehoods. See ACLI Br. 26-30 (collecting cases).

The government also argues (at 46-47) that the common-law materiality requirement should be abandoned to protect the gullible from fantastic schemes. But a falsehood is material only when it "has a natural tendency to influence, or was capable of influencing, the decision *of the decisionmaking body to which it was addressed.*" *Kungys*, 485 U.S. at 770 (emphasis added). Reading the mail, wire, and bank fraud statutes, in accordance with their plain language, to include a materiality element thus provides no shelter for frauds

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[9] The government is not assisted by its citation (at 45) of *Kay* v. *United States*, 303 U.S. 1 (1938), which concerned a statute that punished persons who "make[] *any statement* knowing it to be false." *Id.* at 4 n.1 (emphasis added). The language of such a "false statement" statute removes materiality as an element of the crime. *Wells*, 519 U.S. at 489-491; *id.* at 495 (the "language of the statute in *Kay* was substantially like that" in *Wells*). The language of the mail, wire, and bank fraud statutes — which punish a "scheme or artifice to defraud" — demonstrates the opposite.

directed at naive victims. As *amici* point out, a materiality requirement "prevent[s] unwarranted liability for fraud based on" falsehoods that are implausible even from the perspective of the victim. ACLI Br. 29.

2. The government dismisses the concern that scrapping the materiality element would unjustifiably bring "puffing" or "seller's talk" within the scope of fraud statutes (ACLI Br. 27-28), arguing (at 46) that some courts have justified a "puffing" exception on grounds other than materiality. As the cases cited by *amici* show, however, in numerous jurisdictions the government's reading of the statutes would permit criminal prosecutions and frivolous civil litigation based on immaterial misrepresentations made in the course of a sales pitch.

Even more puzzling is the government's response to *amici*'s observation that removal of the materiality requirement would lead to improper civil liability under RICO. See ACLI Br. 18-21. The government does not deny that allowing civil suits without materiality would be wholly unacceptable. But because some courts have engrafted a reliance element onto civil RICO claims predicated by mail fraud, the government weakly proffers (at 48 n.28) that "the elements that are required in a civil RICO case may be distinct from the elements that are required in a criminal prosecution under a predicate statute." As the government concedes (at 48 n.28), however, even the courts that have identified a reliance requirement under RICO have done so because RICO plaintiffs must show that their injuries are "by reason of" prohibited conduct. 18 U.S.C. § 1964(c). See *Chisholm* v. *Transouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996). That language could not allow a court to impose a special materiality requirement in civil RICO cases. Thus, the prospect of baseless civil RICO suits, if materiality is removed from the fraud statutes, remains both genuine and immediate.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1999

(3)

Supreme Court, U.S.
FILED
NOV 25 1998
CLERK

No. 97-1985

In the Supreme Court of the United States

OCTOBER TERM, 1998

ELLIS E. NEDER, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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2738

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	2
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. WHEN A JUDGE TAKES AN ELEMENT OF A CRIME FROM THE JURY AND DIRECTS A VERDICT AS TO THAT ELEMENT, THERE IS NO CONSTITUTIONALLY ADEQUATE JURY VERDICT THAT AN APPELLATE COURT CAN REVIEW FOR HARMLESS ERROR	6
A. Harmless Error Review Requires a Jury Verdict of Guilt Beyond a Reasonable Doubt as to Each and Every Element of the Offense Charged	6
B. Appellate Courts Cannot Salvage a Jury Verdict That Is Deficient Because the Jury Was Precluded From Deciding One of the Elements of the Crime	9
II. AN ERROR THAT REMOVES AN ELEMENT OF THE CRIME CHARGED FROM THE JURY'S DELIBERATIONS IS STRUCTURAL AND CANNOT BE REVIEWED FOR HARMLESS ERROR	11

TABLE OF CONTENTS -- Continued

A. Removing an Element From the Jury's Deliberations Is a Structural Error Under *Arizona v. Fulminante* 11

B. A Rule That a Judge's Decision Effectively to Direct a Verdict on an Element of a Criminal Offense Can Never Be Harmless Error Flows Naturally From This Court's Decision in *Sullivan v. Louisiana* 18

III. ALLOWING REVIEW FOR HARMLESS ERROR IN CASES WHERE A COURT HAS EFFECTIVELY DIRECTED A VERDICT OF GUILT ON AN ELEMENT OF A CRIMINAL OFFENSE WILL INVARIABLY ERODE THE CONSTITUTIONAL GUARANTEE OF A JURY TRIAL 20

CONCLUSION 23

TABLE OF AUTHORITIES

CASES — Page

Arizona v. Fulminante, 499 U.S. 279 (1991) .. 4, 11, 12
Bollenbach v. United States, 326 U.S. 607 (1946) 9, 10
Cabana v. Bullock, 474 U.S. 376 (1986) 9
Chapman v. California, 386 U.S. 18 (1967) 6, 7
City of Los Angeles v. Heller, 475 U.S. 796 (1986) 10
Dimick v. Schiedt, 293 U.S. 474 (1935) 13
Duncan v. Louisiana, 391 U.S. 145 (1968) 14, 15
Gideon v. Wainwright, 372 U.S. 335 (1963) 12
Griffin v. United States, 502 U.S. 46 (1991) 10
In re Winship, 397 U.S. 358 (1970) 6
Kotteakos v. United States, 328 U.S. 750 (1946) 7, 9
McKaskle v. Wiggins, 465 U.S. 168 (1984) 12
Pope v. Illinois, 481 U.S. 497 (1987) 9
Rose v. Clark, 478 U.S. 570 (1986) 8, 12
Sparf v. United States, 156 U.S. 51 (1895) 16
Starr v. United States, 153 U.S. 614 (1894) 10
State v. Smith, 6 R.I. 33 (1895) 16
Sullivan v. Louisiana, 508 U.S. 275 (1993) ..... *passim*
Tumey v. Ohio, 273 U.S. 510 (1927) 12
United States v. Gaudin, 515 U.S. 506 (1995) 6, 11, 13
Vasquez v. Hillery, 474 U.S. 254 (1986) 12
Waller v. Georgia, 467 U.S. 39 (1984) 12

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III, § 2 15
U.S. Const. amend. VI 15

TABLE OF AUTHORITIES -- Continued

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ELLIS E. NEDER, JR.,
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UNITED STATES OF AMERICA,
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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted on behalf of Petitioner, Ellis E. Neder, Jr. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.[1]

[1] As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party other than *amicus curiae* and its counsel authored this brief in whole or in part; no person or entity, other than *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and to ensure that criminal statutes are construed and applied in accordance with due process.

This brief addresses the first question on which the Court granted certiorari: whether the trial court's failure to instruct the jury on the materiality element in this case was harmless error where materiality was not in dispute at trial. The NACDL urges the Court to hold that constitutional errors that remove one or more of the elements of a criminal offense from the jury's consideration cannot be harmless. When the jury is not instructed that it must find all of the elements of a criminal offense beyond a reasonable doubt, the verdict it renders is necessarily defective, and its conviction cannot stand. Although the Court has suggested this result in its earlier decisions, it has never directly held that errors that have the effect of directing a verdict on an element of a criminal charge cannot be harmless. The NACDL advocates this position to preserve both the fundamental importance of the right to a trial by jury in our criminal justice system and the proper roles of the judge and jury within that system.

SUMMARY OF ARGUMENT

Petitioner has a constitutional right to have a jury of his peers determine whether he is guilty of any crime on which he is tried. According to this Court's previous decisions, that right includes, as its central guarantee, the right to have the jury determine whether the prosecution has proved each of the elements of the criminal charges beyond a reasonable doubt. There is no doubt in this case that the jury did not determine the element of materiality with respect to Petitioner's tax fraud conviction. Instead, the trial court took it upon itself to find that Petitioner's statements were material, effectively directing a verdict against him on that essential element. In so doing, the trial court placed itself in the role of fact-finder, usurping the role of the jury and removing the protective barrier between the prosecutor and the criminally accused that the jury is intended to be.

The Eleventh Circuit's determination that this violation of Petitioner's Sixth Amendment and Due Process rights was harmless should be reversed. First, harmless error review is proper only when a jury renders a verdict of guilty based on factual findings on each and every element of the crime charged. Where a trial court in effect directs a verdict on any one of the elements of a crime, the jury has not rendered a constitutionally valid verdict to be reviewed for error, notwithstanding the jury's determination of guilt on the other elements of the crime charged. In this case, it indisputably was error for the trial judge to make his own findings on materiality, and that error affected not only how the jury reached its decision, but also what questions the jury actually decided. As a consequence, the jury found Petitioner guilty of tax fraud without even having addressed one of that crime's basic elements. That is not a verdict at all. Moreover, an appellate court reviewing the jury's findings cannot be allowed to manufacture a constitutionally sufficient verdict by

supplying its own findings on an element that the jury was instructed not to consider. This Court should hold that harmless error review is inapplicable where, as here, there is no verdict to review because the trial court's error prevented the jury from reaching a determination of guilt on each and every element of the offense.

Second, the Eleventh Circuit's decision should be reversed because the trial court's error in removing the element of materiality from the jury's consideration was a structural error under *Arizona v. Fulminante*, 499 U.S. 279 (1991), and is immune from harmless error analysis. *Fulminante* established that some constitutional errors affect such fundamental rights that they can never be harmless. The right to trial by jury is, and has been since the birth of this nation, the most scrupulously guarded right in our criminal justice system. Other rights, such as the right to be free from self-incrimination, the right to the assistance of counsel, the right to confront witnesses, and the right to have certain evidence excluded from trial, are important to our system of justice, but none equals the right to have a jury of one's peers, rather than the state or the judges it appoints, decide the fundamental question of an accused's guilt. The deprivation of this right, above all others, threatens the very structure of our system of justice and its underlying values. This Court has already recognized in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), that a constitutional error that results in a deficient jury verdict of guilt cannot be reviewed for harmless error. A constitutional error that removes one of the elements of the crime from the jury, no less than one that improperly instructs the jury on reasonable doubt, renders the trial fundamentally unfair and incapable of operating as a reliable vehicle for the determination of guilt and cannot be deemed harmless under any circumstance.

Third, to preserve the value of a criminal jury trial, this Court should articulate a bright line rule that harmless error review is inappropriate where a court has effectively directed a verdict of guilt on an element of a crime. If this Court allows appellate courts to uphold guilty verdicts rendered through the combination of findings by judges and juries merely because the appellate courts deem the evidence to have been "overwhelming" or because the defendant did not "dispute" the missing element, the right to a jury trial will be badly shaken. Criminal defendants dispute *all* the elements of the crime charged by pleading not guilty, and the prosecutor's burden is to establish each and every element beyond a reasonable doubt, whether the evidence is overwhelming or barely existent. Furthermore, if it is harmless error for the judge, rather than the jury, to decide one element of the crime, nothing logically would prevent convictions where the trial judge dispenses with the jury altogether and directs a verdict of guilt. This Court must make clear that our system of criminal justice is concerned with more than simply determining a defendant's innocence or guilt. The primary objective of our criminal justice system is to make these determinations fairly, justly, and within the bounds of the constitutional guarantees, among them the right to trial by jury, that serve to limit the power of the state over the individual.

ARGUMENT

I. WHEN A JUDGE TAKES AN ELEMENT OF A CRIME FROM THE JURY AND DIRECTS A VERDICT AS TO THAT ELEMENT, THERE IS NO CONSTITUTIONALLY ADEQUATE JURY VERDICT THAT AN APPELLATE COURT CAN REVIEW FOR HARMLESS ERROR.

A. Harmless Error Review Requires a Jury Verdict of Guilt Beyond a Reasonable Doubt as to Each and Every Element of the Offense Charged.

Harmless error review presumes that there is a constitutionally adequate verdict in the first instance to review. A constitutionally adequate verdict requires, at the very minimum, a jury's determination that the defendant is guilty beyond a reasonable doubt as to each and every element of the crime with which he is charged. *See United States v. Gaudin*, 515 U.S. 506, 522-23 (1995); *In re Winship*, 397 U.S. 358, 364 (1970). If there is no constitutionally adequate verdict, it follows that there is no verdict for an appellate court to review for harmless error. An appellate court faced with a deficient jury verdict of the kind found in this case therefore has only one option; it must reverse the defendant's conviction and remand the case to the trial court so that a jury can make a complete determination of the defendant's guilt.

This Court first endorsed harmless error review of constitutional errors in *Chapman v. California*, 386 U.S. 18 (1967), when it held that some errors

> are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

Id. at 22. To declare a constitutional error harmless, however, the reviewing court must find beyond a reasonable doubt that the error did not contribute to the defendant's conviction. *See id.* at 23-24. Harmless error review does not turn on whether the jury reached the correct result or whether the jury would have reached the same result absent the error. *See Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

> [T]he question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision.

Kotteakos v. United States, 328 U.S. 750, 764 (1946). Any other inquiry would require the appellate court to hypothesize a guilty verdict that was never rendered, thus violating the Sixth Amendment guarantee of a trial by jury. *See Sullivan*, 508 U.S. at 279-80.

> The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

Id. at 280.

Harmless error review therefore presumes that the jury actually found every fact necessary to support a conviction. In cases where the judge has instructed the jury not to make a finding as to one of the elements of the crime, however, that presumption plainly does not apply. If the jury failed to reach a verdict as to one of the elements of the crime charged, there is no actual verdict to review, *see id.* at 280, and there is no plausible way to determine whether a particular error did or did not substantially affect the verdict.

The case where a trial court removes an element of the crime from the jury, as the trial court did here, is fundamentally different from cases involving unconstitutional presumptions. Where a trial court instructs the jury that it must presume an element if it finds certain preliminary facts, or that it must presume an element unless it is rebutted by evidence from the defense, the jury is still typically instructed that it must find every element of the crime charged beyond a reasonable doubt. *See, e.g., Rose v. Clark*, 478 U.S. 570, 580-81 (1986). In many cases, finding the predicate facts necessary for applying the presumption also conclusively establishes the element, so that the jury, in finding the predicate facts, has effectively made a finding as to each element of the crime charged. *Id.* at 580-81. The jury may have applied the presumption in making its determination, but in choosing to apply the presumption, the jury nonetheless made a finding on each element of the crime. Where the jury's finding of predicate facts is tantamount to a finding on each element of the crime charged, the jury's reliance on an otherwise improper presumption does not so greatly undermine the jury's role in the criminal justice process that it demands automatic reversal. Indeed, in reaching this conclusion, the Court in *Rose* was careful to distinguish the use of a presumption from a situation where, as here, the jury was expressly told not to make a finding on each element of the crime charged. *Id.* at 580-81. In drawing this distinction, the Court necessarily recognized that only where there is a jury verdict on each element of the crime charged can there be a verdict that can be reviewed for harmless error

B. Appellate Courts Cannot Salvage a Jury Verdict That Is Deficient Because the Jury Was Precluded From Deciding One of the Elements of the Crime.

This Court has held repeatedly that appellate review cannot save a deficient jury verdict. If a jury has not reached a determination of all the factual issues necessary to support a conviction, an appellate court cannot supplement the jury's findings with factual findings of its own to create a constitutionally sufficient verdict of guilt. Harmless error review asks not "whether guilt may be spelt out of a record," but rather whether guilt has been properly found by the jury. *Bollenbach v. United States*, 326 U.S. 607, 614 (1946). This Court's previous decisions make clear that appellate courts reviewing constitutional errors for harmlessness should not "speculate upon probable reconviction" or about whether "conviction would, or might probably, have resulted in a properly conducted trial." *Kotteakos*, 328 U.S. at 763, 776. They are bound by what the jury actually did find and cannot hypothesize about what the jury might have found or would have found absent the error. This Court has been unmistakably clear that

> [f]indings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime.

Cabana v. Bullock, 474 U.S. 376, 384-85 (1986), *overruled in part on different grounds by Pope v. Illinois*, 481 U.S. 497 (1987).

Appellate courts sometimes try to salvage inadequate verdicts by surmising that the jury may indeed have found facts related to the particular element, notwithstanding that it was instructed not to consider that element. This may be appropriate in the context where the error in question consists

of an impermissible presumption, but it is not appropriate where the trial judge has explicitly instructed the jury not to consider an element that he or she has determined to have been satisfied as a matter of law. Juries generally are instructed that they are bound to follow the judge's instructions as to the law, *see, e.g.*, 1 Edward J. Devitt et al., *Federal Jury Practice and Instructions* § 12.01 (4th ed. 1992) ("All of the instructions of law given to you by the Court . . . must guide and govern your deliberations."), and appellate courts are bound to presume that juries follow the instructions that they are given by the trial court. *City of Los Angeles v. Heller*, 475 U.S. 796, 798 (1986). Thus, where a trial court has instructed the jury not to consider an element of the crime because it is established as a matter of law, an appellate court reviewing the jury's verdict must presume that the jury followed these instructions.

> "The influence of the trial judge on the jury is necessarily and properly of great weight," and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word.

Bollenbach, 326 U.S. at 612 (quoting *Starr v. United States*, 153 U.S. 614, 626 (1894)). An appellate court cannot presume that a jury that was specifically instructed not to consider a certain element of a crime made independent findings as to that element in direct violation of the trial court's instructions.

> When . . . jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.

Griffin v. United States, 502 U.S. 46, 59 (1991).

Where, as in this case, an element of the crime has been expressly removed from the jury's consideration, there is no way to conclude that guilt has been properly determined by the jury, and an appellate court that undertakes harmless error review is doing no more than spelling guilt out of the record and speculating as to whether the jury would have returned a verdict of guilt had it been given proper instructions. Under this Court's precedent, this is an improper role for an appellate court. Harmless error review is not appropriate where the jury has not determined all the necessary facts to support a conviction, and where a court -- trial or appellate -- has effectively directed a verdict on some element of the crime charged, the jury cannot be said to have determined all facts necessary to support a conviction.

II. AN ERROR THAT REMOVES AN ELEMENT OF THE CRIME CHARGED FROM THE JURY'S DELIBERATIONS IS STRUCTURAL AND CANNOT BE REVIEWED FOR HARMLESS ERROR.

A. Removing an Element From the Jury's Deliberations Is a Structural Error Under *Arizona v. Fulminante*.

Constitutional errors that affect the underlying structure of the trial process such that the trial cannot serve as a reliable means of determining the guilt or innocence of the accused defy harmless error review. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). The error in this case, which this Court has already held to be constitutional in nature, *see United States v. Gaudin*, 515 U.S. 506, 522-23 (1995), effectively deprived Petitioner of his right to a trial by jury because the jury did not make the ultimate determination of his guilt on all of the

elements of the crime of which he was convicted. This right undergirds the criminal trial process, and its deprivation constitutes a structural error that can never be deemed harmless.

In *Fulminante*, the Court divided the universe of constitutional errors into two groups, "structural errors," which are those that affect the framework within which the trial proceeds, and "trial errors," which are those that occur during the presentation of the case to the jury. 499 U.S. at 309-10. Trial errors can be reviewed for harmlessness, while structural errors, because of their very nature, must never be so reviewed. *Id.* Among those constitutional errors that this Court has held to be structural are the denial of the right to counsel at trial, *Gideon v. Wainwright*, 372 U.S. 335 (1963), the denial of the right to an unbiased judge, *Tumey v. Ohio*, 273 U.S. 510 (1927), the exclusion of members of the defendant's race from a grand jury, *Vasquez v. Hillery*, 474 U.S. 254 (1986), the denial of the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168 (1984), the denial of the right to a public trial, *Waller v. Georgia*, 467 U.S. 39 (1984), and the denial of the right to have the jury instructed on the reasonable doubt standard, *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

> Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.

Rose v. Clark, 478 U.S. 570, 577-78 (1986) (citation omitted).

Denying a defendant his right to have a jury deliberate on each and every element of the crime with which he is charged also should be included among those errors previously recognized as structural because such a denial goes to the

heart of the constitutional guarantee of a trial by jury, a guarantee that has historically occupied an exalted position in our criminal justice system. The jury is obviously part of the structure of a criminal trial; in fact, it is its nucleus. Depriving a criminal defendant of its protections is certainly structural error, which this Court has held can never be harmless.

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1935).

"The right to have a jury make the ultimate determination of guilt has an impressive pedigree." *Gaudin*, 515 U.S. at 510 (citing 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769)).[2]

> When our more immediate ancestors removed to America, they brought this great privilege with them, as their birth-right and inheritance, as a part of that admirable common law, which had fenced round, and interposed barriers on every side against the approaches of arbitrary power.

Joseph Story, *Commentaries on the Constitution of the United States* § 923 (Ronald D. Rotunda & John E. Nowak eds., 1987). The right to trial by jury for the criminally accused became firmly established in the common law and was

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[2] For additional discussion about the use of juries throughout history, see Morris J. Bloomstein, *Verdict: The Jury System* (rev. ed. 1968); John Proffatt, *A Treatise on Trial By Jury* (1877). *See also* Harold M. Hyman & Catherine M. Tarrant, *Aspects of American Trial Jury History*, in *The Jury System in America* (Rita James Simon ed., 1975); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867 (1994).

regarded as "the grand bulwark of his liberties." 4 W. Blackstone, *Commentaries on the Laws of England* 342 (1769). The right was considered essential to freedom, and its denial was cause for great concern. Blackstone warned that

> inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in questions of the most momentous concern.

Id. at 344.

> [B]y the time our Constitution was written, jury trial[s] in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689.

Duncan v. Louisiana, 391 U.S. 145, 151 (1968).

Our Constitution naturally reflects the fundamental importance of the jury to our system of justice. Indeed, at the Constitutional Convention, the importance of trial by jury was one of the few consistent points of agreement between the Federalists and the Anti-Federalists. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 871 (1994). Alexander Hamilton wrote in *The Federalist No. 83*:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.

The Federalist No. 83, at 426 (Alexander Hamilton) (Max Beloff ed. 2d ed., 1987). The unanimous agreement as to the importance of trial by jury for the criminal defendant is illustrated by the fact that it is the only right to be expressly guaranteed both in the body of the Constitution itself, U.S. Const. art. III, § 2 ("[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"), and in the Bill of Rights, U.S. Const. amend. VI ("[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury").

The Framers strove to protect the citizens from unchecked and arbitrary abuses of power by the government. They were aware that tyrannical governments used their power to institute criminal prosecutions to eliminate their political enemies and to control their subjects. The Framers therefore insisted on creating an independent judiciary and provided trial by jury as a further protection against the government.

> Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.

Duncan, 391 U.S. at 156.

The role of the jury in criminal cases has been guarded as carefully as the existence of the jury itself, since having a jury present during trial is of little value unless the jury has the actual power to stand between the accused and the state. As a result, the boundary between the respective roles of the judge and jury in a criminal trial has been scrupulously guarded throughout history. "Where the judges have usurped the province of the jury in other countries, the jury has been undermined, and abolished in the end." John Proffatt, *A Treatise on Trial By Jury* § 306a, at 373-74 (1877). While

the precise location of the boundary between judge and jury has shifted somewhat throughout our history, the need for maintaining that boundary has been consistently recognized.

> The line between the duties of a court and jury . . . is perfectly well defined; and the rigid observance of it is of the last importance to the administration of systematic justice. . . . In this way, court and jury are made responsible, each in its appropriate department, for the part taken by each . . . and in this way alone can errors of fact and errors of law be traced . . . to their proper sources.

Sparf v. United States, 156 U.S. 51, 84 (1895) (quoting *State v. Smith*, 6 R.I. 33, 34 (1859)). This Court has stated that,

> [u]pon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be.

Sparf, 156 U.S. at 102.

> In this separation of the functions of court and jury is found the chief value, as well as safety, of the jury system. Those functions cannot be confounded or disregarded without endangering the stability of public justice, as well as the security of private and personal rights.

Id. at 106.

The Framers felt that ensuring community participation in the determination of the guilt of the criminally accused provided a check against the law enforcement powers of the executive. To that end, juries do not simply render advisory opinions to be ratified or rejected by the trial judge. Their verdicts represent conclusive findings (subject only to narrowly tailored standards of review) as to both the facts in

dispute and the application of the law to the facts. Juries are not allowed to abdicate their role to the judge by entering findings on some, but not all, of the issues and leaving the final determination of guilt to the judge. If juries were allowed to render partial verdicts and request that the judge fill in the remaining elements, the guarantee of trial by jury would have little meaning and next to no value.

Likewise, judges are not permitted at trial to encroach on the province of the jury by making their own factual findings. This is true whether the judge attempts to make factual findings after a jury has failed to reach a verdict or, as in this case, before the jury is even instructed. Either way, when the judge enters findings of fact, the process of trial by jury has been irreparably changed. The defendant may have been convicted, but not by a jury.

If we are willing to label as harmless the constitutional error that occurred in this case, we will be endorsing a view of criminal justice where the ends justify the means. As a nation, we pride ourselves on the system by which justice is delivered. We have always assumed that our criminal justice process -- where grand juries indict, prosecutors present evidence, judges charge on the law, and juries determine guilt -- involves a delicate balance of power, designed to protect the individual criminal defendant and the community at large from the enormous power of government. It is the very framework of our system that provides its protections. This Court reached that conclusion in *Fulminante*, where it held that constitutional errors that threaten the framework of the criminal trial are never harmless.

The trial court in this case rewrote the rules for Petitioner's criminal trial, casting itself as the fact-finder in place of the jury. Judges cannot be allowed to recast their role in this way. A reallocation of power between judge and

jury upsets the framework within which justice is dispensed, which, according to *Fulminante*, can never be harmless.

B. A Rule That a Judge's Decision Effectively to Direct a Verdict on an Element of a Criminal Offense Can Never Be Harmless Error Flows Naturally From This Court's Decision in *Sullivan v. Louisiana*.

This Court has already held that it cannot be harmless error when a trial court instructs a jury in a way that results in the jury returning a defective verdict of guilt. *Sullivan v. Louisiana*, 508 U.S. 275 (1993), held that a constitutionally defective reasonable doubt instruction was structural error, which can never be harmless. *Id.* at 281. If it is never harmless to give an erroneous jury instruction on reasonable doubt because of the threat that the resulting jury verdict may not comply with the guarantees of Due Process and the right to a jury trial, then it follows that it is never harmless for a trial court to direct a verdict on one or more elements of the crime charged, allowing the jury to deliberate only on what the trial court has not already resolved. Both errors not only deprive the defendant of his constitutional rights, but they also undermine the framework within which criminal trials must proceed.

In *Sullivan*, the state court trial judge gave the jury an unconstitutional instruction on reasonable doubt. 508 U.S. at 277. On direct appeal, the Supreme Court of Louisiana upheld the conviction, finding that the unconstitutional instruction had been harmless error. *Id.* This Court disagreed in a unanimous opinion, reversed Sullivan's conviction, and remanded the case for a new trial. *Id.* at 282. The Court reasoned that the right to trial by jury is fundamental to the American scheme of justice and that it includes, as its most

important element, the right to have the jury decide the issue of the defendant's guilt. *Id.* at 277. The Court began with the premise that the prosecution bears the burden of proving each element of the crime charged beyond a reasonable doubt, *id.* at 277-78, and that an erroneous reasonable doubt instruction violated the defendant's constitutional rights. The only issue was whether that error could properly be reviewed under a harmless error standard. The Court held that because of the judge's erroneous instruction, the jury had not rendered a verdict of guilt beyond a reasonable doubt, and "the entire premise of Chapman review is simply absent." *Id.* at 280.

> There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless.

Id. The most an appellate court reviewing the verdict could hope to conclude would be that the jury would have found the defendant guilty beyond a reasonable doubt if it had been instructed properly. But this sort of speculation does not support a finding that the constitutional error was harmless, because the wrong entity -- an appellate court -- would ultimately have adjudged the defendant guilty.

> The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

Id.

Sullivan firmly establishes that the defendant's right to a jury verdict of guilt beyond a reasonable doubt is a basic protection "whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function" and that the deprivation of that right

"unquestionably qualifies as 'structural error.'" *Id.* at 281-82. The constitutional error committed by the trial court below is no different. The error deprived Petitioner of his right to have the jury determine whether the prosecution had proven *every element* of his crime. For the same reasons underlying the Court's opinion in *Sullivan*, the constitutional error that indisputably occurred in this case qualifies as structural error and cannot be subject to harmless error review. This Court should not hesitate to extend its holding in *Sullivan* to cases where the judge has effectively directed a verdict of guilt as to an element of the crime charged, thereby preventing the jury from reaching a valid determination of guilt.

III. ALLOWING REVIEW FOR HARMLESS ERROR IN CASES WHERE A COURT HAS EFFECTIVELY DIRECTED A VERDICT OF GUILT ON AN ELEMENT OF A CRIMINAL OFFENSE WILL INVARIABLY ERODE THE CONSTITUTIONAL GUARANTEE OF A JURY TRIAL.

In deciding that certain constitutional errors are never harmless, and are therefore immune from harmless error review, this Court has created bright lines to guide appellate review of both state and federal convictions. Bright line rules are necessary in this context to ensure consistent application of constitutional protections and to prevent courts from administering justice in a manner that is dependent on the vagaries of a particular case. There may be cases where, for example, denial of a convicted defendant's right to counsel would seem to have had no effect on the outcome because even the best defense lawyer in the country could not have convinced a jury to acquit. But this Court does not allow that

kind of *post facto* review in cases where a defendant was not given his right to counsel because to do so would gradually erode the constitutional guarantees that are at the heart of our criminal justice system -- guarantees on which the structure of our system is built.

The same bright line rule previously articulated by this Court that prevents harmless error review of structural errors is necessary in this case. Here, the district court effectively granted a directed verdict in favor of the prosecution on the element of materiality, thereby completely removing that element from the jury's consideration of Petitioner's alleged tax fraud. In any given case, an appellate court might conclude on review of such a conviction that directing a verdict in this fashion was in fact harmless because no reasonable juror could possibly disagree with the trial judge's determination. This kind of *post facto* review for harmless error, however, would allow appellate courts to pick and choose which convictions should be reversed without any guiding principles. Moreover, a court's characterization of an element as "undisputed" should not be allowed to bring errors that are otherwise structural within the universe of harmless error review. When a criminal defendant pleads not guilty, he disputes every element of the crime charged. This is his constitutional right, regardless of the nature of the evidence against him. The fact that a defendant does not affirmatively dispute the existence of a particular element of a crime is legally irrelevant.

Here, Petitioner's conviction was upheld when the trial court directed a verdict on only *one* of the elements of the crime charged, because that error was deemed to be harmless. If this Court condones such an approach, nothing would prevent the same outcome in cases where a trial court directs a verdict on substantially all or perhaps even all elements of the crime charged. If review for harmless error is permitted in

cases where one element has been removed from the jury's consideration, there will be no principled reason to stop there. Inevitably, a defendant's constitutional right to have a jury, and not a judge, decide his guilt would be gradually diminished as judges increasingly co-opted the jury's role.

There is only one way for this Court to prevent the erosion of constitutional protections that the lower court's holding invites and that is to announce a bright line rule that errors that remove an element of a criminal offense from the consideration of the jury can never be deemed harmless. The right to have a jury decide whether the prosecution has met its burden as to each and every element of an indictment is no less fundamental than the right to counsel, the right to an unbiased judge, or the right to a proper instruction on the reasonable doubt standard.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Eleventh Circuit with respect to its holding that the trial court's directed verdict on materiality is subject to review for harmless error and should remand the case for a new trial.

Respectfully submitted,

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November 27, 1998

Supreme Court, U.S.
FILED
NOV 27 1998
CLERK

(4)

No. 97-1985

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ELLIS E. NEDER, JR.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMERICAN COUNCIL OF LIFE INSURANCE, HEALTH INSURANCE ASSOCIATION OF AMERICA AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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40pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 8

I. A PROPER CONSTRUCTION OF THE FEDERAL STATUTES PROSCRIBING MAIL FRAUD, WIRE FRAUD AND BANK FRAUD COMPELS THE CONCLUSION THAT EACH OF THESE OFFENSES INCLUDES THE ELEMENT OF MATERIALITY 8

A. The Language and History of the Federal Mail Fraud, Wire Fraud and Bank Fraud Statutes Dictate That These Statutes Require Proof of Materiality 9

B. Recognizing Materiality as an Element of Federal Mail Fraud, Wire Fraud and Bank Fraud Is Consistent with This Court's Decision in *United States* v. *Wells* 13

II. RECOGNIZING MATERIALITY AS AN ELEMENT OF FEDERAL MAIL FRAUD, WIRE FRAUD AND BANK FRAUD IS IMPERATIVE TO PREVENT UNWARRANTED AND FRIVOLOUS CIVIL LITIGATION 18

A. The Ruling in This Case Will Broadly Affect Civil As Well As Criminal Litigation 18

B. Absent the Limiting Factor of Materiality, Liability Under RICO and Many Federal Civil Fraud Statutes Would Expand Far Beyond What Congress Intended 21

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: Page(s)

Agency Holding Corp. v. *Mailey-Duff & Associates Inc.*, 483 U.S. 143 (1987) 18

Asgrow Seed Co. v. *Winterboer*, 513 U.S. 179 (1995) 10

BMW of North America v. *Gore*, 517 U.S. 559 (1996) 15

Babb v. *Bolyard*, 72 A.2d 13 (Md. 1950) 29

Baggett v. *Bullitt*, 377 U.S. 360 (1964) 19

Barlow v. *McLeod*, 666 F. Supp. 222 (D.D.C. 1986) 28

Basic, Inc. v. *Levinson*, 485 U.S. 224 (1988) 7, 23

Carpenter v. *United States*, 484 U.S. 19 (1987) 10

Deming v. *Darling*, 20 N.E. 107 (Mass. 1889) 22

DiSandro v. *Makahuena Corp.*, 588 F. Supp. 889 (D. Haw. 1984) 20

Ellis v. *Newbrough*, 27 P. 490 (N.M. 1891) 30

Farnsworth v. *Duffner*, 142 U.S. 43 (1891) 23

Finley v. *Dalton*, 164 S.E.2d 763 (S.C. 1968) 26

Fischer v. *N.Y. Stock Exch.*, 408 F. Supp. 745 (S.D.N.Y. 1976) 27

Gilbert/Robinson, Inc. v. *Carrie Beverage-Missouri, Inc.*, 989 F.2d 985 (8th Cir. 1992) 20

Glass Coffee Brewer Corp. v. *Embry*, 166 S.W.2d 818 (Ky. 1942) 28

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15 U.S.C. § 77q(a)(1) 6, 20

McCarran-Ferguson Act of 1945, 15 U.S.C. § 1011 *et seq.* 2

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16 U.S.C. § 1857(1)(l) 21

18 U.S.C. § 1014 ..... *passim*

18 U.S.C. § 1341 ..... *passim*

18 U.S.C. § 1343 ..... *passim*

18 U.S.C. § 1344 ..... *passim*

18 U.S.C. § 1546 ..... 7, 20

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140 Cong. Rec. H10773 (daily ed. Oct.4, 1994) 13

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INTERESTS OF *AMICI CURIAE*

Amici are among the principal business associations in the United States.[1]

The American Council of Life Insurance ("ACLI") is the nation's largest nonprofit life insurance trade association. ACLI is composed of 532 member companies, which together underwrite 89 percent of the life insurance currently in force in the United States. ACLI has represented its members in legislative and administrative matters, and has submitted *amicus curiae* briefs on behalf of its members in state and federal courts throughout the country.

The Health Insurance Association of America ("HIAA"), based in Washington, D.C., is one of the largest associations of health insurance companies in the world. HIAA is an advocate for the private, market-based health insurance system. Its more than 225 members provide medical expense and supplemental insurance, as well as long-term care insurance and disability income protection to more than 110 million Americans. HIAA develops and advocates federal and state policies which build upon the U.S. health care system's quality, affordability, accessibility and responsiveness.

The National Association of Manufacturers ("the NAM") is the nation's oldest and largest broad-based industrial trade association. Its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85 percent of all

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Court. No counsel for either party authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

manufacturing workers and produce more than 80 percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

Amici's interest in this case stems from the critical role that materiality plays in curbing frivolous civil litigation for fraud. This Court's determination whether materiality is an element of the federal offenses of mail fraud, wire fraud and bank fraud will inevitably affect such litigation, in particular because mail and wire fraud are the "predicate acts" most commonly relied on by civil litigants under the federal Racketeering Influenced and Corrupt Organizations Act ("RICO"). If this Court were to find that materiality is *not* an element of federal mail or wire fraud, the lure of treble damages under RICO would almost certainly prompt a plethora of civil suits based on frivolous claims that would not survive the test of materiality.

The *amici* insurance associations note that, under the McCarran-Ferguson Act of 1945, 15 U.S.C. § 1011 *et seq.*, a federal statute that, like the federal fraud statutes at issue in this case, does not "specifically relate to the business of insurance" may be applied to insurance only where such application does not "invalidate, impair, or supersede" state law. *Id.* § 1012(b). Despite this broad preclusion of federal law's application to insurance, the insurance association *amici* have an interest in this case. First, the scope and meaning of "invalidate, impair, or supersede" in the McCarran-Ferguson Act are currently under review by this Court. *See Humana* v. *Forsyth*, No. 97-303 (scheduled for oral argument Nov. 30, 1998). Second, even if the Court correctly interprets that phrase to the full extent of its intended breadth, there may still be circumstances in which the application to insurance of the federal mail fraud, wire fraud or bank fraud statutes, or one of the many similar federal fraud statutes that do not specifically relate to insurance, would not effectively "invalidate, impair or

supersede" state law. Accordingly, while fully adhering to their position (including as *amici* in *Humana* v. *Forsyth*) that Congress intended the McCarran-Ferguson Act to preclude virtually all claims involving the application to insurance of federal statutes not specifically related to the insurance business, the insurance association *amici* join with the NAM in urging the Court to recognize, as Congress intended, that materiality is an element of the federal offenses of mail fraud, wire fraud and bank fraud.

SUMMARY OF ARGUMENT

The federal mail fraud, wire fraud and bank fraud statutes, 18 U.S.C. §§ 1341, 1343 and 1344 ("Sections 1341, 1343 and 1334), all prohibit any "scheme or artifice" to "defraud" or to obtain money or property "by means of false or fraudulent pretenses, representations, or promises." None of these three statutes expressly uses the term "material." However, each of these statutes implicitly incorporates the element of materiality.

Congress did not need to use the term "material" in the federal mail fraud, wire fraud and bank fraud statutes in order to indicate that these statutes proscribe only material misrepresentations or concealments. Both at the time of the mail fraud statute's original enactment in 1872 and later, when the mail fraud statute was amended and the wire fraud and bank fraud statutes were adopted, it was commonly understood that materiality is an integral element of the offense of fraud. Given this understanding, express use of the term "material" was not necessary to confine the proper application of Sections 1341, 1343 and 1344 to communications or concealments of a material nature.

"Fraud" and "defraud" were defined in numerous legal dictionaries published in the late 19th and early 20th centuries, as they are today, with reference to the element of materiality. For example, the 1904 edition of West's

Judicial and Statutory Definitions of Words and Phrases provides:

> Fraud consists in the misrepresentation or concealment of a *material* fact calculated to deceive the opposite party.
>
> A misrepresentation of *material* facts is a fraud.

1 West's JUDICIAL AND STATUTORY DEFINITIONS OF WORDS AND PHRASES 2951 (1904) (case citations omitted) (emphasis supplied). Similarly, *Bouvier's Law Dictionary* of 1897 defines "fraud" as, *inter alia*, "the misrepresentation by word or deed of material facts." BOUVIER'S LAW DICTIONARY 844 (1897). These and other contemporaneous dictionaries reflect, and indeed expressly cite, the established body of case law on materiality as an element of fraud.

In *United States* v. *Wells*, 117 S. Ct. 921, 927 (1997), this Court confirmed its established presumption that "Congress incorporates the common-law meaning of the terms it uses if those 'terms . . . have accumulated settled meaning under . . . the common law' and 'the statute [does not] otherwise dictat[e].' " (quoting *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 322 (1992) (quoting *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739 (1989))). Neither the language nor the legislative history of Sections 1341, 1343 and 1344 contains any evidence to rebut the presumption that, in proscribing "fraud" in these statutes (through *inter alia*, use of the term "defraud"), Congress meant to incorporate the established common-law meaning of that term.

The court of appeals below plainly erred in finding otherwise. The court below reached its erroneous conclusion through a fundamental misunderstanding of the lessons of *Wells*. First, the court failed to understand the significance

found by this Court in *Wells* with respect to the enactment of the statute at issue in that case, 18 U.S.C. § 1014 ("Section 1014"), as part of the recodification of the federal criminal code in 1948. As the Court explained in *Wells*, Section 1014 emerged from the 1948 recodification as a consolidation of a number of preexisting provisions, some of which had expressly used the term "material." Thus, it could be inferred that Congress specifically intended *not* to include materiality as an element of Section 1014. *Id.* at 928. In contrast, the 1948 enactment of Section 1341 involved merely renumbering and simplifying certain language of the original mail fraud statute, with no change in meaning. Thus, the significance of the 1948 recodification that the *Wells* Court found with respect to Section 1014 simply does not exist with respect to Section 1341.

Second, the court of appeals overlooked other key distinctions between Section 1014 and Sections 1341, 1343 and 1344 that indicate that the latter statutes implicitly incorporate the element of materiality. Foremost among these is an obvious textual distinction: Section 1014 prohibits "false statements," whereas Sections 1341, 1343 and 1344 prohibit schemes to "defraud." The term "false statement" "carries no general suggestion of influential significance." *Wells*, 117 S. Ct. 926-27 (citing *Kungys*, 485 U.S. at 781). "Defraud," however, inherently *does* suggest influence. Indeed, the very *existence* of a fraud depends on its influential significance.

There is also a critical distinction between Section 1014 and Sections 1341, 1343 and 1344 with respect to inferences of congressional intent. As noted, there is no indication that in enacting Sections 1341, 1343, and 1344, Congress intended to eliminate the element of materiality from the statute. Moreover, it was never contended in *Wells* that the term "false statements" has a settled, common-law meaning that incorporates materiality. *Wells*, 117 S. Ct. at 927. Here, there is a vast body of case law, reflected in

late 19th and 20th century dictionary definitions of "fraud" and "defraud," confirming that those terms have a longstanding common-law meaning incorporating materiality.

Further, as the Court in *Wells* emphasized, certain terms may implicitly carry a requirement of materiality while others do not. *See Wells*, 117 S. Ct. at 927, n.10 (noting that "*Kungys* distinguished between the common-law meaning of 'misrepresentation' and 'false testimony,' concluding that while the former had been held to carry a materiality requirement in many contexts, the terms 'false' or 'falsity' did not as frequently carry such an implication."). Since "defraud" has always carried an implicit requirement of materiality, both the plain language and the legislative history of Sections 1341, 1343 and 1344 support the conclusion that materiality is an element of federal mail fraud, wire fraud and bank fraud.

This Court's decision regarding the implicit element of materiality in Sections 1341, 1343 and 1344 will have much broader ramifications than just with respect to prosecutions under those three statutes. The decision will also affect prosecutions under the other criminal statutes with language parallel to that of Sections 1341, 1343 and 1344. Further, the decision will affect the application of *civil* statutes whose language parallels that of Sections 1341, 1343 and 1344. *See, e.g.*, 15 U.S.C. § 77q(a)(1) ("device, scheme, or artifice to defraud"); 15 U.S.C. § 1703(a)(2)(A) (same). Finally, the decision will have an obvious and potentially significant impact on litigation, particularly civil litigation, under the federal Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 ("RICO"). Mail and wire fraud are by far the most commonly relied-on predicate acts for civil RICO claims, and a ruling by this Court that materiality is not an element of federal mail fraud or wire fraud would invite a plethora of unwarranted civil suits under RICO.

The broad definitions of fraud in the mail fraud, wire fraud and bank fraud statutes already enable relatively innocuous and common commercial disputes to be challenged as "racketeering activity" under RICO. The requirement to prove materiality in order to establish liability for mail fraud, wire fraud or bank fraud is a critical curb on an even broader sweep of RICO into areas of essentially innocuous business activity. Absent that curb, virtually any misleading comment in the course of regular business dealings, however trivial and ineffectual, could give rise to treble damages under RICO. Congress cannot plausibly have intended this result.

Of course, Sections 1341, 1343 and 1344 are not the only statutes specifying offenses that are predicate acts under RICO. Many of the other "predicate act" statutes have language very similar to that of Sections 1341, 1343, and 1344. To date, courts have interpreted these other statutes implicitly to require proof of materiality. *See, e.g., United States* v. *West Indies Transport, Inc.*, 127 F.3d 299, 304 (3d Cir. 1997) (18 U.S.C. § 1546 ("procured by fraud")), *cert. denied*, 118 S. Ct. 700 (1998). If this Court were to find that materiality is *not* an element of Sections 1341, 1343 and 1344, claims regarding violations of these other statutes, in addition to Sections 1341, 1343 and 1344, could spawn unwarranted civil RICO litigation.

This Court has explicitly emphasized the importance of materiality as an element of fraud. *See, e.g., Basic, Inc.* v. *Levinson*, 485 U.S. 224, 231 (1988) (explaining that it is important to be "careful not to set too low a standard of materiality" in order to exclude trivial omissions). In *Kungys* v. *United States*, 485 U.S. 759, 780 (1988), the Court described the effect of removing the element of materiality as "draconian." Again, in *Wells*, the Court recognized that materiality operates as a limit to making "a surprisingly broad range of unremarkable conduct a violation of federal law." 117 S. Ct. at 931 (quoting *Williams* v. *United States*,

458 U.S. 279, 287 (1982)). The Court has, therefore, already observed the dangers of excluding materiality from such key statutes as those at issue here. Given the plain language and legislative history of these three particular statutes, there is every reason to abide by the presumption that Congress intended to incorporate the common law meaning of the terms used in Sections 1341, 1343 and 1344, including the element of materiality.

Consistent with this presumption and other established principles of statutory construction, the Court should hold that materiality is element of federal mail fraud, wire fraud and bank fraud.

ARGUMENT

I. A PROPER CONSTRUCTION OF THE FEDERAL STATUTES PROSCRIBING MAIL FRAUD, WIRE FRAUD AND BANK FRAUD COMPELS THE CONCLUSION THAT EACH OF THESE OFFENSES INCLUDES THE ELEMENT OF MATERIALITY

The federal mail fraud and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343 ("Sections 1341 and 1343"), both provide, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . [uses the U.S. mails (Section 1341) or means of interstate or foreign wire, radio or television communication (Section 1343)] for the purpose of executing such scheme or artifice . . . shall be fined under this title or imprisoned not more then five years, or both.

The federal bank fraud statute, 18 U.S.C. § 1344 ("Section 1344"), in near-identical language, proscribes a "scheme or artifice" to "defraud" a financial institution or to obtain the property of such an institution "by means of false or fraudulent pretenses, representations, or promises."

Congress did not use the term "material" in the federal mail fraud, wire fraud and bank fraud statutes. Congress had no need to make such explicit reference because, both at the time of the mail fraud statute's original enactment in 1872 and thereafter, it was commonly understood that materiality is an integral element of the offense of fraud. Given this understanding, it was unnecessary for Congress to expressly use the term "material" in order to confine the statutory prohibition to conduct of a material nature.

A. The Language and History of the Federal Mail Fraud, Wire Fraud and Bank Fraud Statutes Dictate That These Statutes Require Proof of Materiality

Whether Sections 1341, 1343 and 1344 implicitly include a materiality element is a matter of statutory interpretation. As this Court has recognized, " 'the starting point in any case involving the meaning of a statute, is the language of the statute itself.' " *United States Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 500 (1993) (quoting *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 210 (1979)). In this case, the key language to be interpreted is the phrase "scheme or artifice to defraud." In particular, given that Sections 1341, 1343, and 1344 prohibit "fraud," it is critical to glean the intended meaning of "fraud" and "defraud."

Congress did not define "fraud" or "defraud" in the mail fraud, wire fraud or bank fraud statutes. Accordingly, these terms must be assumed to bear their ordinary meaning.

Asgrow Seed Co. v. *Winterboer*, 513 U.S. 179, 187 (1995). As used in the mail fraud statute, and therefore by implication in the wire fraud and bank fraud statutes as well, *see Carpenter* v. *United States*, 484 U.S. 19, 25 n.6 (1987) (it is appropriate to apply the same analysis to mail and wire fraud offenses based on the language shared by the two statutes); S. REP. NO. 98-225, at 378 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3519 (the bank fraud statute was "modeled on the present wire and mail fraud statutes"), these terms presumably had the meaning reflected in dictionaries roughly contemporaneous with the enactment of the federal mail fraud statute in 1872. *See, e.g.*, *MCI Telecomm.* v. *American Tel. & Tel. Corp.*, 512 U.S. 218, 228 (1994); *see also Smiley* v. *Citibank, N.A.*, 517 U.S. 735, 745 (1996) (using 19th century dictionaries to interpret the term "interest" in the National Bank Act of 1864); *Smith* v. *Wade*, 461 U.S. 30, 60 n.3 (same, regarding the term "malice" in § 1 of the Civil Rights Act of 1871).

The definitions of "fraud" and "defraud" in those dictionaries confirm that, by the late 19th century, "materiality" was well-established as an element of fraud. For example, the Anderson *Dictionary of Law* published in 1893 defines "fraud" by explaining, *inter alia*, that false statements amount to fraud only where they are knowingly false *and* material:

> *[T]he fact that they are material is proof of an attempted fraud*, because their materiality, in the eye of the law, consists in their tendency to influence the conduct of the party who has an interest in them, and to whom they are addressed.

WILLIAM C. ANDERSON, A DICTIONARY OF LAW 475 (1893) (citing case law) (emphasis supplied). *See also id.* at 882 ("Where a party, by words or deeds, intentionally misrepresents a *material* fact, or produces a false impression,

in order to mislead or to obtain an undue advantage of another, he is chargeable with positive fraud") (emphasis supplied).

Likewise, the 1904 edition of West's *Judicial and Statutory Definitions of Words and Phrases* provides:

> Fraud consists in the misrepresentation or concealment of a *material* fact calculated to deceive the opposite party.
>
> A misrepresentation of *material* facts is a fraud .... If a misrepresentation was of a trifling or immaterial thing ... there is no reason to interfere to grant relief on the ground of fraud.

1 West's JUDICIAL AND STATUTORY DEFINITIONS OF WORDS AND PHRASES 2951 (1904) (case citations omitted) (emphasis supplied). This 1904 dictionary further defines "actionable fraud" as "a deception practiced in order to induce another to part with property or to surrender some legal right," specifically stating that "[t]he false statement must be *material*" to be actionable. *Id.* at 147 (emphasis supplied). Similarly, the 1891 edition of Black's *Dictionary of Law* states that "[f]raud, as applied to contracts, is the cause of an error bearing on a *material* part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other." BLACK'S DICTIONARY OF LAW 517 (1st ed. 1891) (emphasis supplied).

Other roughly contemporaneous dictionaries likewise emphasize the materiality element of fraud. *See, e.g.*, 1 ABBOTT'S DICTIONARY OF TERMS AND PHRASES 522 (1879) ("Fraud, in its general acceptation, may be defined [as] the misrepresentation or concealment of a material fact."); *id.*, Vol. II, at 113 ("A false representation, though no

breach of [an insurance] contract, if material, avoids the policy on the ground of fraud"); BOUVIER'S LAW DICTIONARY 844 (1897) (defining "fraud" as, *inter alia*, "the misrepresentation by word or deed of material facts" and stating: "Where a party intentionally or by design misrepresents a material fact or produces a false impression, in order to mislead another, or to obtain an undue advantage of him, there is positive fraud in the fullest sense of the term"); BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 2227 (8th ed. 1914) ("So the mere puffing of articles to be sold is held not to amount to such a misrepresentation as will amount to fraud.").

Plainly, materiality was inherent in the concept of fraud at the time the federal mail fraud statute was enacted. By proscribing "any scheme or artifice to defraud" in that statute, Congress can only plausibly have intended to prohibit *materially* deceptive communications or concealments. As Petitioner has amply demonstrated, the legislative history of the mail fraud statute, while notably scant, supports such a conclusion. *See* Brief of Petitioner ("Pet. Br.") at 38-41.[2] There is nothing in either the language or the legislative history of the mail fraud, wire fraud or bank fraud statutes to rebut the proper presumption that, in using the terms "defraud" and "fraudulently" in these statutes, "Congress mean[t] to incorporate the established meanings of these terms" under common law. *NLRB* v. *Amax Coal Co.*, 453 U.S. 322; 329 (1981).[3]

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[2] For further history on the mail fraud statute, *see* Jed S. Rakoff, *The Federal Mail Fraud Statute* (Part I), 18 DUQ. L. REV. 771, 779-87 (1980); Donald V. Morano, *The Mail-Fraud Statute: A Procrustean Bed*, 14 J. MARSHALL L. REV. 45, 45-47 & n.2 (1980).

[3] Notably, the Department of Justice, in a memorandum submitted for the record of the House of Representatives in 1994,

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B. Recognizing Materiality as an Element of Federal Mail Fraud, Wire Fraud and Bank Fraud Is Consistent with This Court's Decision in *United States* v. *Wells*

In the decision below, the Court of Appeals for the Eleventh Circuit justified its holding that materiality is not an element of Sections 1341, 1343 and 1344 by reference to this Court's decision in *United States* v. *Wells*, 117 S. Ct. 921 (1997). *See* Appendix to Petition ("Pet. App.") at 6a-9a. Specifically, the court of appeals reasoned that Sections 1341, 1343 and 1344 do not include a materiality element because they share with 18 U.S.C. § 1014 ("Section 1014") the characteristics of that statute that led the Court in *Wells* to find that Section 1014 lacks a materiality element. *Id.* Focusing on Section 1341 (since Sections 1343 and 1344 were patterned on Section 1341), the court of appeals identified two such shared characteristics: first, a lack of express use of the term "material," and second, enactment as part of the recodification of the federal

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emphasized the materiality element in the federal mail fraud statute. In defending proposed bankruptcy fraud legislation against criticisms of potential overbreadth, the Justice Department stated:

> The [p]roposed [legislation], patterned after the mail and wire fraud statutes (18 U.S.C. §§ 1341, 1343), would require proof of devising or intending to devise a "scheme or artifice to defraud." Like the mail fraud statute, an essential element of the proposed statute . . . [is] the requirement that any fraud be 'material" (while not in any statutory language, "materiality" is an element of bankruptcy fraud as well) . . . .

140 Cong. Rec. H10773 (daily ed. Oct. 4, 1994).

criminal code in 1948. *Id.* at 7a, 9a. Based on these two shared characteristics, the court of appeals concluded, there is no element of materiality in Section 1341, 1343 or 1344.

Of course, the court of appeals was accurate in observing that Sections 1341, 1343 and 1344 are similar to Section 1014 in lacking an express use of the term "material." The court was *not* accurate, however, regarding the significance of the enactment of Section 1341 as part of the 1948 recodification of the federal criminal code. As Petitioner has explained, the enactment of Section 1341 in the 1948 recodification involved nothing more than renumbering and simplifying certain language of the original mail fraud statute, with no change in meaning. Pet. Br. at 47. In contrast, as the Court in *Wells* observed, the enactment of Section 1014 involved consolidating a number of preexisting provisions, some of which expressly included the term "material," and Congress eliminated that term as part of the 1948 recodification. Thus, the significance of the 1948 recodification for Section 1014 that this Court identified in *Wells* simply does not exist with respect to Section 1341.

In fact, contrary to the court of appeals' view, there are numerous important distinctions between Section 1014 and Sections 1341, 1343 and 1344, each of which suggests that the decision regarding implied materiality in this case should be the opposite of that in *Wells*. First, there is a critical textual distinction between Section 1014 and Sections 1341, 1343 and 1344. The former prohibits "false statements," while the latter prohibits schemes to "defraud."[4]

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[4] The additional prohibition of "false or fraudulent pretenses, representations, or promises" in Sections 1341, 1343 and 1344 is integrally tied to, if not subsumed in the prohibition of schemes to "defraud." *See* Pet. Br. at 31 n.14 (citing *McNally* v. *United States*, 483 U.S. 350, 357-59 (1987)). Moreover, "pretenses," "representations" and "promises" are all terms that, in contrast to

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In *Wells*, this Court considered whether the term "false statement" itself suggests a materiality element. Noting that, as determined in *Kungys* v. *United States*, 485 U.S. 759, 770 (1988), a statement is "material" if it "has a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed," the *Wells* Court found that the term "false statement" in Section 1014 "carries no general suggestion of influential significance." *Wells*, 117 S. Ct. 926-27 (citing *Kungys*, 485 U.S. at 781). However, "defraud" inherently *does* suggest influence. Indeed, the very *existence* of a fraud depends on its influential significance. One can only "defraud" another through influence; unlike a false statement, a "fraud" *requires* influence.

Second, there is a critical distinction between Section 1014 and Sections 1341, 1343 and 1344 with respect to inferences of congressional intent. In *Wells*, the Court reiterated its established presumption that "Congress incorporates the common-law meaning of the terms it uses if those 'terms . . . have accumulated settled meaning under . . . the common law' and 'the statute [does not] otherwise dictat[e].' " *Wells*, 117 S. Ct. at 927 (quoting *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 322 (1992) (quoting *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739 (1989)). In *Wells*, there were no claims about the settled meaning of "false statements" at common law. *Wells*, 117 S. Ct. at 927. Here, however, it is amply evident that "fraud" and "defraud" have firmly established meanings under common law and that these meanings incorporate a materiality requirement. *See BMW of North America* v. *Gore*, 517 U.S. 559, 579 (1996) ("actionable fraud requires a *material* misrepresentation or omission") (citing

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"statements," suggest the essence of materiality element: having a "tendency to influence." *See* Pet. Br. at 46.

RESTATEMENT (SECOND) OF TORTS § 538 (1977)); W. PAGE KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS § 108 (5th ed. 1984), (emphasis supplied). *See also* STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 32:63 (1992) ("One of the fundamental principles of the law of fraud and deceit is that to constitute fraud in any case, the facts misrepresented or concealed must be material facts which substantially affect the interests of the person alleged to have been defrauded."). Further, the evidence indicates that Congress intended to incorporate the common law meanings of "fraud" and "defraud" in Sections 1341, 1343 and 1344. *See* Pet. Br. at 33-35.

Finally, as discussed above, the legislative history of Section 1014 distinguishes that statute from Sections 1341, 1343 and 1344. Since Congress actually removed the term "material" from certain of the provisions consolidated into Section 1014 in 1948, it may be reasonable to infer, as found by the Court in *Wells*, that Congress intended *not* to include a materiality element in that statute. However, Congress *never* used the term "material" in Section 1341 or its predecessor statute, and therefore it would *not* be reasonable to make the same inference here. In fact, there is absolutely nothing in the legislative history of Section 1341 (or that of Sections 1343 and 1344) to support such an inference. *See* Pet. Br. at 38-41; Rakoff, *supra*, at 782; Morano, *supra*, at 45-47.

As the Court in *Wells* emphasized, certain terms may implicitly carry a requirement of materiality while others do not. *See Wells*, 117 S. Ct. at 927, n.10 (noting that "*Kungys* distinguished between the common-law meaning of 'misrepresentation' and 'false testimony,' concluding that while the former had been held to carry a materiality requirement in many contexts, the terms 'false' or 'falsity' did not as frequently carry such an implication"). Thus, in *Kungys*, the Court found that although the prohibition of a "willful misrepresentation" in 8 U.S.C. § 1451(a) (which

expressly uses the term "material") includes a materiality element, the separate prohibition against giving "false testimony" in 8 U.S.C. § 1101(f)(6) does not. The Court's conclusion regarding the latter prohibition was not based merely on the absence of the term "material" in 8 U.S.C. § 1101(f). Rather, it was based on a careful analysis of statutory text. As the Court emphasized, a requirement of materiality may be appropriately inferred to be implicit in the term "misrepresentation" because "the word 'misrepresentation' . . . has been held to have that implication in many contexts – as the name of the common-law tort of misrepresentation (which requires a material falsehood) adequately demonstrates." *Kungys*, 485 U.S. at 781.

In this case, the key statutory term – "defraud" – has always carried an implicit requirement of materiality. To "defraud" is to influence, and influence is the essence of materiality. Unlike a "false statement" or "false testimony," which may or may not be intended to (or in fact) influence another person, fraud is *always*, by definition, designed to do so.

For all these reasons, consistent with *Wells*, Sections 1341, 1343 and 1344 can only properly be read as incorporating the element of materiality.

II. RECOGNIZING MATERIALITY AS AN ELEMENT OF FEDERAL MAIL FRAUD, WIRE FRAUD AND BANK FRAUD IS IMPERATIVE TO PREVENT UNWARRANTED AND FRIVOLOUS CIVIL LITIGATION

A. The Ruling in This Case Will Broadly Affect Civil As Well As Criminal Litigation

This case involves three criminal statutes, but its implications extend far beyond the criminal context. Most significantly, all of the three statutes at issue define offenses that are "predicate acts" for civil suits under the federal Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 ("RICO"). Indeed, mail and wire fraud are by far the most commonly relied-on predicate acts for civil RICO claims. *Agency Holding Corp.* v. *Mailey-Duff & Assocs. Inc.*, 483 U.S. 143, 149 (1987); *see also Holmes* v. *Securities Inv. Prot. Corp.*, 503 U.S. 258 (1992).

A ruling by this Court that materiality is not an element of federal mail fraud or wire fraud would invite a plethora of unwarranted civil suits under RICO. Already, civil RICO has spawned litigation far beyond the scope envisioned by Congress. *See, e.g., Sedima, S.P.R.L.* v. *Imrex, Co.*, 473 U.S. 479, 500 (1985) ("[I]n its private civil version, RICO is evolving into something quite different from the original conception of its enactors."); *see also id.* at 492 ("The 'extraordinary' uses to which civil RICO has been put appear to be primarily the result of the breadth of predicate offenses, in particular the inclusion of wire, mail, and securities fraud"). Although in the criminal context, prosecutorial discretion may serve as a check on improper use of RICO, no such discretion limits the appetite of civil RICO litigants. *See* William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 10 (1989) ("[T]here is no such thing as prosecutorial discretion to limit the use of civil RICO by plaintiffs' attorneys. Any good lawyer who

can bring himself within the terms of the federal civil RICO provisions will sue in federal court because of the prospect of treble damages and attorney fees which civil RICO holds out."); *Schreiber Distributing, Inc.* v. *Serv-Well Furniture Co.*, 806 F.2d 1393, 1402 (9th Cir. 1986) (Kennedy, J., concurring) ("The reach . . . of the federal mail and wire fraud . . . statutes exists against a backdrop of prosecutorial discretion, however . . . [n]o such check operates in the civil realm.")[5]

The broad language in the mail fraud, wire fraud and bank fraud statutes enables relatively innocuous and common commercial disputes to be challenged as "racketeering activity" under RICO. *See* Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945, 960-62 (1993). As discussed further in Part II.B below, the requirement to prove materiality serves as a critical curb on an even broader sweep of RICO into areas of essentially innocuous business activity. Absent that curb, virtually any misleading comment in the course of regular business dealings, however trivial and ineffectual, could give rise to treble damages under RICO. Congress cannot plausibly have intended this result. *See* Rehnquist, *supra*, at 9-10 ("virtually everyone who has addressed the question agrees that civil RICO is now being used in ways that Congress never intended . . . . The legislative history of the RICO Act strongly suggests that Congress never intended that civil RICO should be used, as it is today, in ordinary commercial disputes far divorced from the influences of organized crime.").

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[5] In fact, this Court has refused to rely on "prosecutorial discretion" to ensure that criminal statutes are not extended beyond their proper reach. *See, e.g., Keyishian* v. *Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 599 (1967); *Baggett* v. *Bullitt*, 377 U.S. 360, 373-74 (1964).

Mail fraud, wire fraud and bank fraud are, of course, not the only predicate acts for RICO liability. *See* 18 U.S.C. 1961(1). Many of the other predicate acts are defined in statutes with language very similar to that of Sections 1341, 1343, and 1344, with no express reference to materiality. To date, courts have interpreted these other statutes implicitly to require proof of materiality. *See, e.g., United States* v. *West Indies Transport, Inc.,* 127 F.3d 299, 304 (3d Cir. 1997) (18 U.S.C. § 1546 ("procured by fraud")), *cert. denied*, 118 S. Ct. 700 (1998); *In re Natale,* 136 B.R. 344, 349 (Bankr. E.D.N.Y. 1992) (11 U.S.C. § 727(a)(4)(B) ("fraudulently . . . presented or used a false claim")); *United States* v. *Naftalin,* 579 F.2d 444 (8th Cir. 1978) (15 U.S.C. § 77q(a)(1) ("device, scheme, or artifice to defraud")), *rev'd on other grounds,* 441 U.S. 768 (1979); *DiSandro* v. *Makahuena Corp.,* 588 F. Supp. 889, 894 (D. Haw. 1984) (15 U.S.C. § 1703(a)(2)(A) ("device, scheme, or artifice to defraud")); *In re Farley,* 15 B.R. 11, 13 (Bankr. D. Or. 1981) (11 U.S.C. § 523(a)(2)(A) ("actual fraud")). Each of the statutes referenced above, since their language parallels that of the statutes at issue here, could serve to spawn a wide variety of unwarranted RICO claims if this Court were to find that materiality is *not* an element of federal mail fraud, wire fraud or bank fraud.

Although unwarranted RICO suits may be the most immediate threat in the civil law context of a finding that materiality is not an element of federal mail fraud, wire fraud or bank fraud, such a finding, independent of RICO, could also improperly expand liability under numerous other federal civil fraud statutes with language paralleling that in Sections 1341, 1343 and 1344 that have to date been read to imply an element of materiality. *See, e.g., Gilbert/Robinson, Inc.* v. *Carrie Beverage-Missouri, Inc.,* 989 F.2d 985, 992 (8th Cir. 1992) (15 U.S.C. § 1120 (providing a private cause of action for damages from another's "fraudulent declaration or representation" in a trademark registration)).

There can be little doubt that the Court's decision on materiality in this case will extend far beyond liability under Sections 1341, 1343 and 1344. Indeed, in just the one year since the Court decided in *Wells* that materiality is not an element of 18 U.S.C. § 1014, the lower federal courts, including but not limited to the court of appeals below, have held that materiality is not an element of a number of other federal "false statement" statutes when not expressly required by the language. *See, e.g., United States* v. *Condon,* 132 F.3d 653, 656 (11th Cir.) (relying on *Wells* in determining that materiality is not an element under 15 U.S.C. § 645(a)), *cert. denied sub nom., Brawner* v. *United States*, 118 S. Ct. 1547, (1998); *United States* v. *Tomeny,* 144 F.3d 749, 753 (11th Cir. 1998) (relying on *Wells* in holding that 16 U.S.C. § 1857(1)(l) does not require an element of materiality because none is mentioned); *United States* v. *DeCastro,* 113 F.3d 176, 179 (11th Cir. 1997) (relying on *Wells* in finding no implicit materiality element in 18 U.S.C. § 1010); *United States* v. *Boeing Co.,* No. C-1-95-375, 1998 WL 469884, at *4 (S.D. Ohio May 8, 1998) (relying on *Wells* in holding 31 U.S.C. § 3729 does not require materiality). Given the many statutes with language parallel to that of Sections 1341, 1343 and 1344, the Court's decision on materiality here inevitably will affect liability under a wide variety of statutes, both criminal and civil.

B. Absent the Limiting Factor of Materiality, Liability Under RICO and Many Federal Civil Fraud Statutes Would Expand Far Beyond What Congress Intended

Materiality provides an objective criterion that requires a false representation to be one that a reasonable man would consider pertinent, relevant, or germane to the transaction and which would have influenced him in his action. *See Wells,* 117 S. Ct. at 926 ("natural tendency to influence") (quoting *Kungys* v. *United States,* 485 U.S. 759, 770 (1988)); *see also United States* v. *Gaudin,* 515 U.S. 506,

509 (1993); RESTATEMENT (SECOND) OF TORTS § 537-38 (1977); RESTATEMENT (SECOND) OF CONTRACTS §§ 162-64, 306 (1981). As discussed in Part I.A above and in the Brief for Petitioner, there is substantial evidence that Congress did not intend that the federal mail fraud, wire fraud, and bank fraud statutes criminalize trivial acts of deception that could not plausibly have such effect.

Absent the objective limit provided by the test of materiality, a wide range of innocuous acts would legally constitute "fraud." Any such act could be used as a pretext for escaping from bargains with which a party is dissatisfied on other grounds. Justice Holmes eloquently captured the value of the materiality element in stating: "The rule of law is hardly to be regretted, when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value, when the expectation has been disappointed." *Deming* v. *Darling*, 20 N.E. 107, 108-09 (Mass. 1889); *see also Hall* v. *Johnson*, 2 N.W. 55, 57-58 (Mich. 1879) ("Immaterial representations, whether true or false, cannot be made the basis of relief .... Anything short of this would be unsafe, and would render it exceedingly dangerous for parties to conduct the ordinary business transactions of the day.").

Materiality marks the outer bounds on liability, denying plaintiffs the option of claiming reliance on trivial or inconsequential representations and hoping to find a sensitive or sympathetic jury. "By the requirement of materiality the law screens claims of fraud and excludes a kind of claim that would be too easy to make and too hard to disprove." James Fleming, Jr. & Oscar J. Gray, *Misrepresentation – Part II*, 37 MD. L. REV. 488, 500 (1978). Prosser explains that "[t]he most cogent reason for the requirement of materiality is that of promoting stability in commercial transactions. [Materiality provides] 'some assurance that the representee is not merely using the misrepresentation as a pretext for escaping a bargain that he

is dissatisfied with on other grounds.'" PROSSER AND KEETON *supra* § 108, at 753 (quoting Keeton, *Actionable Misrepresentation*, OKLA. L. REV. 56, 59 (1949)).

This Court has explicitly emphasized the importance of materiality as an element of fraud. *See Basic, Inc.* v. *Levinson*, 485 U.S. 224, 231 (1988) (explaining that it is important to be "careful not to set too low a standard of materiality" in order to exclude trivial omissions). *See also TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 448-49 & n.10 (1976) (noting the "need to avoid the adverse consequences of setting too low a threshold for civil liability ... liability for insignificant omissions or misstatements"); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 384 (1970) (holding that materiality "serves the purpose of ensuring that a cause of action cannot be established by proof of a defect so trivial, so unrelated to the transaction"). *Cf. Farnsworth* v. *Duffner*, 142 U.S. 43, 47-48 (1891).

In *Kungys*, this Court described the effect of removing the element of materiality as "draconian." 485 U.S. at 780. Again, in *Wells*, the Court recognized that materiality operates as a limit to making "a surprisingly broad range of unremarkable conduct a violation of federal law." 117 S. Ct. at 931 (quoting *Williams* v. *United States*, 458 U.S. 279, 287 (1982)). While holding in these cases that materiality was not necessary to ensure that reasonable limits are observed in prosecutions under 18 U.S.C. § 1014 and 8 U.S.C. § 1101(f)(6), the Court made clear that its holdings were appropriate because the limiting function of materiality is served by the specific language of those particular statutes. *Wells*, 117 S. Ct. at 931 ("A literal reading of the statute will not normally take the scope of Section 1014 beyond the limit that a materiality requirement would impose."); *Kungys*, 485 U.S. at 780-81 ("literal reading of the statute does not produce draconian results").

The specific language of the mail fraud, wire fraud and bank fraud statutes does not provide the "built-in limitations" that the Court found to exist in Section 1014 and 8 U.S.C. § 1101(f)(6). Section 1014 prohibits, in relevant part, making a false statement or representation "*for the purpose of influencing* in any way the actions of" an FDIC-insured institution. (Emphasis supplied.) The Court in *Wells* reasoned that "a statement made 'for the purpose of influencing' a bank will not usually be about something a banker would regard as trivial," *i.e.*, this specific statutory language effectively precludes convictions for immaterial false statements. Sections 1341, 1343 and 1344, however, do not use the phrase "for the purpose of influencing" another person. In order to prevent convictions for immaterial misrepresentations in cases involving federal mail fraud, wire fraud or bank fraud, therefore, the jury must be specially instructed regarding the "influence" element – *i.e.*, it must be instructed on materiality.

The statute found in *Kungys* to have "built-in limitations" is likewise distinguishable from the mail fraud, wire fraud and bank fraud. That statute, 8 U.S.C. § 1101(f)(6), prohibits "giv[ing] false testimony for the purpose of obtaining any [immigration] benefits." In *Kungys*, the Court found that this language protects against convictions for immaterial falsehoods because, *inter alia*, it applies only to testimony – i.e., the limited body of false statements made orally under oath. *Kungys*, 485 U.S. at 780. Moreover, "testimony" does not include falsehoods in the form of concealments. *Id.* at 781.

The mail fraud, wire fraud and bank fraud statutes, however, are far broader: they cover virtually any form of communication as well as concealments. *See, e.g.*, *United States* v. *Rodolitz*, 786 F.2d 77 (2d Cir. 1986) (affirming conviction for mail fraud where defendant concealed from his insurer his company's involvement in the repair of his damaged roof); *United States* v. *Reinhold*, No. (S2) 97-CR-686 (AGS), 1998 WL 557583 (S.D.N.Y. Sept. 2, 1998) (denying motions for acquittal where defendants were convicted of wire fraud for concealing from lender the true nature of putative accounts receivable securing loan). Because Sections 1341, 1343 and 1344 lack the type of "built-in limitations" against the dangers of not requiring proof of materiality, that this Court identified in *Wells* and *Kungys* and because they do not otherwise embody "built-in limitations" to prevent such dangers, materiality is *not* a superfluous or unnecessary means of safeguarding against improper convictions for mail fraud, wire fraud or bank fraud.[6]

This Court itself, in an opinion regarding the mail fraud statute in its early embodiment, suggested that materiality is an element of federal mail fraud. *See United States* v. *New South Farm & Home Co.*, 241 U.S. 64, 71 (1916) ("Mere puffing, indeed, might not be within the meaning [of the mail fraud statute]."). That suggestion hints at the many scenarios in which, absent the check of the materiality test, defendants could be convicted for mail fraud, wire fraud or bank fraud based on merely trivial, irrelevant, or implausible misrepresentations, as illustrated below.

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[6] In civil fraud cases, reliance generally is an additional element, but materiality is not established by proof of reliance. Reliance is a subjective criterion, whereas materiality is an objective test. PROSSER § 108, at 749-50, 753 ("Materiality . . . provide[s] some objective corroboration to plaintiff's claim that he did rely." "Necessarily the test must be an objective one."). Therefore, while reliance might be inferred from a finding of materiality, the reverse is not true. *Cf. Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1096 (1991). Moreover, not all jurisdictions require actual reliance as an element of civil fraud actions. *See New Jersey Carpenters Health Fund* v. *Philip Morris, Inc.*, 17 F. Supp. 2d 324, 339 n.19 (D.N.J. 1998) (collecting cases).

1. *Trivial Misrepresentations*

The requirement to prove materiality in fraud cases, including under Sections 1341, 1343 and 1344, has properly protected against unwarranted liability for merely trivial misrepresentations. For example, in *United States* v. *McNeive,* 536 F.2d 1245 (8th Cir. 1976), the Eighth Circuit reversed a conviction under Section 1341 for lack of materiality. The defendant, a city chief plumbing inspector accepted unsolicited gratuities from a plumbing contractor for the issuance of plumbing permits. *Id.* at 1246. The issuance of such permits was a nondiscretionary duty and the inspector did not deviate from the plumbing code in any respect. *Id.* at 1252. Nor did the defendant actively conceal his activity. The court, observing the pervasiveness of "[t]he practice of tipping others as an expression of appreciation for the performance of ministerial tasks," characterized the situation as "a minor peculation, possibly a misdemeanor." *Id.* The court held to permit the mail fraud statute to reach such trivial conduct "would effect a further extension of § 1341 so as to cover all actions which might offend the Government's sense of personal propriety. This we refuse to do, particularly since [such a holding] would have far-reaching ramifications . . . ." *Id.*

Other cases provide similar examples of trivial conduct alleged to constitute fraud but recognized by courts to be non-actionable due to lack of materiality. *See, e.g., United States* v. *Davis,* 989 F.2d 244, 247 (7th Cir. 1993) (Posner, J.) (reversing federal bank fraud conviction because the government failed to prove that the defendant's misrepresentation in opening an account in the name of a mythical company was material to the bank's decision to allow him to deposit a wrongly obtained IRS refund check); *Lucas* v. *Long,* 94 A. 12, 15 (Md. 1915) (holding that land buyer's misrepresentations regarding plans for the land were not fraudulent because they "had no influence whatever upon the minds of the defendants."); *Finley* v. *Dalton,* 164 S.E.2d

763, 765 (S.C. 1968) (same); *Greenawalt* v. *Rogers,* 91 P. 526, 528 (Cal. 1907) (reversing judgment against defendant because his misrepresentation that he had no property was immaterial to plaintiff's decision to settle debt when the value of the property was only $400 and plaintiff knew defendant had other debts amounting to $11,500). *Cf. Fischer* v. *N.Y. Stock Exch.,* 408 F. Supp. 745, 754 (S.D.N.Y. 1976) (acknowledging that "there is a serious question of the materiality . . . . Damaging information . . . may well be[ ] immaterial if the person alleging [federal securities law] fraud subsequently becomes aware of even more negative facts and yet goes ahead with the transaction.").

Absent the requirement to show materiality in proving federal mail fraud, wire fraud, or bank fraud, "puffing" or seller's talk, perhaps the most common form of alleged misrepresentation, would give rise to liability, upsetting a vast body of well-established case law. *See, e.g., United States* v. *Brown,* 79 F.3d 1550, 1559 (11th Cir. 1996) (reversing federal mail fraud convictions because "reasonable jurors could not find that a person of ordinary prudence . . . would rely on . . . representations about the value or rental income of the GDC homes"); *United States* v. *Pearlstein,* 576 F.2d 531, 540 n.3 (3d Cir. 1978) (holding statements that company is "nationally known" and that product is "among the finest . . . in the world" are "not cognizable under federal mail fraud statute"); *Raab* v. *General Physics Corp.,* 4 F.3d 286, 289-90 (4th Cir. 1993) (affirming dismissal of action for federal securities fraud because "[n]o reasonable investor would rely on . . . loose prediction . . . statements. . . . Imposing [such] liability would put companies in a whipsaw, with a lawsuit almost a certainty."); *Williams* v. *Texaco Refining,* 53 F.3d 330 (4th Cir. 1995) (affirming dismissal of action against Texaco for misrepresenting the amount for which it would settle claims because the "statement was mere puffery made in arms-length settlement negotiations . . . simply not a

misrepresentation of material fact, an element essential to a fraud claim"). Congress cannot plausibly have intended to criminalize such conduct.

2. *Irrelevant Misrepresentations*

The element of materiality has also served as a check against unwarranted liability for fraud based on irrelevant representations. In *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970), for example, the Second Circuit reversed convictions under Section 1341 for lack of materiality. The only misrepresentation made by the defendants concerned a false pretext, such as a referral by a friend, for making sales calls. The court explained, "we are confronted with the proposition of simply declaring that any untrue statement designed to obtain the ear of a potential customer comes within the purview of the mail fraud statute. We believe it is prudent to avoid this pitfall." *Id.* at 1178. The court explained that the misrepresentations concerned *why* the salesmen were able to offer a bargain and not the goods being sold. The misrepresentations were immaterial because they were not capable of affecting customers' understanding of the sale or influencing their assessment of the value of the product. *Id.* at 1182.

Numerous other cases illustrate how the materiality element has served to prevent unwarranted liability for fraud, including in circumstances where, should this Court read materiality out of Sections 1341, 1343 and 1344, immaterial conduct could be grounds for federal criminal convictions. *See, e.g., Barlow* v. *McLeod,* 666 F. Supp. 222, 228 (D.D.C. 1986) (granting summary judgment against lender asserting RICO claim because it was immaterial to the transaction that the borrower introduced a third party as a "vice-president"); *Glass Coffee Brewer Corp.* v. *Embry,* 166 S.W.2d 818, 823 (Ky. 1943) (reversing judgment against defendant because misrepresentation to customer that no sales commission would be paid to agent was immaterial to agent who got

paid); *Babb* v. *Bolyard,* 72 A.2d 13, 17 (Md. 1950) (reversing judgment against defendant because plaintiff "had not 'the right, as a person of ordinary business prudence,' to rely upon the [defendant's] alleged misrepresentation of [another] dealer's price of new Buicks"); *Provident Loan Trust Co.* v. *McIntosh,* 75 P. 498 (Kan. 1904) (holding that misrepresentations regarding details of seller's title was immaterial when good title was still conveyed). These are only a few of the many real-world examples that serve to demonstrate the key role of materiality in checking unwarranted liability for fraud.

3. *Implausible Misrepresentations*

Requiring materiality also has served to prevent unwarranted liability for fraud based on implausible misrepresentations. In one of the earliest cases brought under the federal mail fraud statute, *United States* v. *Fay*, 83 F. 839, 839 (E.D. Mo. 1897), the defendant wrote to another, claiming that "he, the defendant, had some mysterious, superhuman power; among other things, to penetrate with mental vision into the bowels of the earth, and discover the location there of supposed hidden treasures . . . and assuring him that for $50 he would positively find certain treasures . . . ." The defendant was charged with having devised a scheme to defraud in contravention of the mail fraud statute.

The court quashed the indictment because although there was a scheme, it was not a scheme to defraud. Using the same materiality standard enunciated in *Gaudin* and *Wells,* the court held that "there is no scheme set out in the indictment reasonably *adapted to deceive persons of ordinary prudence.*" *Id.* at 840 (emphasis supplied). Comparing the scheme to one proposing "to take a person on a flying trip to the moon," the court explained: "I cannot believe it possible that a rational being possessed of ordinary prudence and sagacity, could or would be deceived by any

such irrational, visionary, and stupid pretense as was made by the defendant in this case." *Id.* at 839. *See also Miller* v. *Protrka,* 238 P.2d 753, 759-60 (Or. 1951) (holding sellers of motels did not make fraudulent representations because "a 100 per cent tenancy was at least an improbable expectation, if not an impossible one"); *Williams* v. *Rank & Son Buick, Inc.,* 170 N.W.2d 807 (Wis. 1969) (reversing judgment against defendant because misrepresentation in advertisement regarding air-conditioning was immaterial after purchaser examined car and took an unaccompanied one and one-half hour test drive); *Ellis* v. *Newbrough,* 27 P. 490, 493 (N.M. 1891) (reversing judgment against cult because representations regarding utopian life were immaterial to plaintiff's decision to join).

This Court has "often stated that when there are two rational readings of a criminal statute, one harsher than the other, [the Court is] to choose the harsher only when Congress has spoken in clear and definite language." *McNally* v. *United States*, 483 U.S. 350, 359-60 (1987) (citing *United States* v. *Bass*, 404 U.S. 336, 347 (1971); *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S 218, 221-22 (1952)). Consistent with this doctrine and other established principles of statutory construction, the Court should hold that materiality is element of federal mail fraud, wire fraud and bank fraud.

CONCLUSION

For the reasons set forth above, a*mici* respectfully urge the Court to reverse the decision below and to hold that materiality is an element of federal mail fraud, bank fraud and wire fraud.

Respectfully submitted,

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November 27, 1998